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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

MATTHEW A. CRAIG,

Petitioner

v.

JOHN BRIGADIER, SUSAN M. BRIGADIER, DAVID L. BRIGADIER, JACQUELYN F. LENSON, RISER FOODS COMPANY, d/b/a GIANT EAGLE, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. This Court and several circuits have previously held that the Labor Management Relations Act *only* preempts a claim where the claim requires interpretation of the terms of a collective bargaining agreement. Here, the Sixth Circuit acknowledged that Petitioner's complaint relies exclusively upon Ohio law but concluded that, because resolution of the claims in the complaint will require a court to address relationships created through the collective bargaining process and because the asserted harm arises out of employment generally governed by a collective bargaining agreement, the Labor Management Relations Act preempts the claims even though no specific terms require interpretation. Does the standard applied by the Sixth Circuit for Labor Management Relations Act preemption directly conflict with prior decision of this Court and other circuits such that this Court should grant certiorari to resolve the conflict?

II. This Court has previously held that examining the existence or severity of the harm of discharge alleged in a complaint does not require a court to evaluate the parameters for proper and improper discharge under a collective bargaining agreement. Here, the Sixth Circuit held that "examining the existence and...severity" of the harm of

discharge as alleged in Petitioner's complaint will "require the court to evaluate the parameters for proper and improper discharge" under a collective bargaining agreement and, therefore, the Labor Management Relations Act preempts the claims set forth in the complaint. Does the Sixth Circuit's decision directly conflict with this Court's prior decision such that this Court should grant certiorari to resolve the conflict?

III. This Court has previously held that evaluating the existence of an alleged improper motive of a defendant does not require a court to examine the terms of a collective bargaining agreement. Here, the Sixth Circuit held that the complaint's assertion of the improper motive of certain Respondents for committing various torts against Petitioner would "require the court to assess the parameters of the current working environment and the functioning of various grievance procedures" and, therefore, causes the Labor Management Relations Act to preempt the claims. Does the Sixth Circuit's decision directly conflict with this Court's prior decision such that this Court should grant certiorari to resolve the conflict?

IV. The Labor Management Relations Act only applies to suits for breach of a collective bargaining agreement between an employer and a labor organization. Here, the Sixth Circuit held that the Labor Management Relations Act preempted Petitioner's state law tort claims against persons who were neither associated with any employer nor labor organization at issue herein. Does the Sixth Circuit's decision directly conflict with doctrine of this Court and decisions of other circuits such that this Court should grant certiorari to resolve the conflict?

V. 28 U.S.C. § 1654 and federal appellate court decisions hold that any person may conduct his/her own case in federal court to the same extent as if represented by counsel. Fed. R. App. P. 34(a) provides a general entitlement to oral argument on appeal. Here, as it does in virtually all cases involving pro se litigants, the Sixth Circuit denied Petitioner's request for oral argument. Is the Sixth Circuit's standing policy of denying oral argument in cases involving pro se litigants unjust, run contra to 28 U.S.C. § 1654 and the right of self-representation otherwise expressed by prior judicial decisions of this Court and other circuits, and conflict with Fed. R. App. P. 34(a) and the implementation of Fed. R. App. P. 34(a) by other circuits such that this Court should grant certiorari to determine the

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DECISIONS BELOW

The Sixth Circuit's decision below is unpublished. The District Court's decision below is also unpublished, but appears on Westlaw under the citation: 2006 WL 840364.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered an order affirming the district court below on June 4, 2007. With leave of court, Petitioner filed a *Petition for Rehearing* with the Sixth Circuit on July 3, 2007. The Sixth Circuit denied the *Petition for Rehearing* on July 10, 2007. This Court has jurisdiction to review the decisions below pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) provides, in pertinent part:

> (a) Venue, amount, and citizenship
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the

citizenship of the parties.

28 U.S.C. § 1654, entitled "Appearance personally or by counsel," provides:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

STATEMENT OF THE CASE

I. Petitioner's Employment with Riser Foods Company.

Respondent Riser Foods Company, a retail grocery chain doing business as Giant Eagle, Inc. (hereinafter "Riser") hired Petitioner Matthew A. Craig (hereinafter "Craig") as a Part-Time Grocery Clerk for its retail store #0185 located in Middleburg Heights, Ohio (hereinafter "0185"), and Craig began work on July 27, 2003. (First Amended Complaint ¶10). Upon entering into the employment relationship with Riser, Craig became subject to a collective bargaining agreement (hereinafter "the Agreement") by and between Riser and United Food & Commercial Workers Union Local No. 880 (hereinafter "UFCW"). (First Amended Complaint ¶9). Riser regularly employed Craig at 0185 until his discharge on July 1, 2004. (First Amended Complaint ¶11). Sometime after Riser hired Craig,

Riser hired Respondent John M. Brigadier to work at 0185.

II. Respondents commit the torts of slander, libel, tortious interference with an employment/contractual relationship, and civil conspiracy against Craig.

Sometime before June 25, 2004, without any provocation or notice to Craig, John M. Brigadier falsely and maliciously alleged to others including, but not limited to, Respondents Sue M. Brigadier, David L. Brigadier, Jacquelyn F. Lenson (hereinafter "Lenson"), and two (2) persons identified by John M. Brigadier in a written statement who are not parties to this action, that Craig had committed sexual harassment against him. (First Amended Complaint ¶21; *First Affidavit of Matthew A. Craig* ¶¶14-16, District Court Docket Item 28, Exhibit 'D'; *Unsworn Declaration of Jacquelyn Lenson Baon*, Exhibit 'A,' District Court Docket Item 26). John M. Brigadier's motive in making the false and unprovoked allegations was to injure Craig's contractual relationship with Riser and to secure a more lax working environment for himself under the supervision of a more lenient supervisor. (First Amended Complaint ¶¶22, 64).

Upon receiving the false allegations, Sue M. Brigadier and David L. Brigadier caused the further publication of the allegations to others including, but not limited to, Riser, by and through its employees, even though they knew or should have known the allegations to be specious. (First Amended

Complaint ¶¶26, 32-33; *First Affidavit of Matthew A. Craig* ¶¶14-17, District Court Docket Item 28, Exhibit 'D'; *Unsworn Declaration of Jacquelyn Lenson Baon*, Exhibit 'A,' District Court Docket Item 26). Sue and David Brigadier's motive in publishing the false allegations was to injure Craig's contractual relationship with Riser, attempt to vicariously obtain damages from Riser, and/or attempt to obtain a more lax working environment for their son John M. Brigadier. (First Amended Complaint ¶¶26, 67).

Upon receiving the false allegations, Lenson and Riser, by and through Lenson, caused the further publication of the allegations even though they knew or should have known the allegations to be specious. (First Amended Complaint ¶¶38-40, 43-45, 52-53). Lenson's publication included statements not made during the course of any legitimate investigation of the false allegations and publishing to others outside of Riser management. (*First Affidavit of Matthew A. Craig* ¶¶14-16, District Court Docket Item 28, Exhibit 'D'). Lenson's motive in publishing the false allegations was to benefit her employer, Riser, by injuring Craig's contractual relationship with Riser and thereby reducing the risk of Sue M. Brigadier and David L. Brigadier from bringing a lawsuit on behalf of John M. Brigadier against Riser. (First Amended Complaint ¶53).

In addition to perpetuating the false sexual harassment allegations, Lenson also falsely and maliciously accused Craig, in the presence of others, of having committed criminal voyeurism in relation

to a non-party employee. (First Amended Complaint ¶48).

Sometime before June 25, 2004, without any provocation or notice to Craig, *John Doe* falsely and maliciously alleged to others in written and/or oral form that Craig had ordered an employee under eighteen years of age to operate hazardous machinery in violation of federal and state laws including 29 C.F.R. § 570.63, section 4109.05 of the Ohio Revised Code, and section 4101:9-2-10 of the Ohio Administrative Code. (First Amended Complaint ¶¶56, 60). John Doe's motive in making the false allegations was to injure Craig's employment/contractual relationship with Riser and, thereby, secure a more lax working environment under the supervision of a more lenient supervisor. (First Amended Complaint ¶¶57, 61, 71, 73).

The tortious conduct of Respondents herein has subjected Craig to ridicule and has caused Craig to suffer personal humiliation, mental anguish, and degradation of his reputation that, in turn, has caused Craig to suffer personal, professional, and financial injury. (First Amended Complaint ¶¶22-23, 29-30, 33-34, 40-41, 45-46, 49-50, 54, 57-58, 61-62, 65, 69, 74, 77, 80).

III. Craig suffers discharge from employment for allegedly walking out of a meeting and thereafter pursues remedy under the Agreement.

On June 25, 2004, Riser demoted Craig from

his position as Manager-in-Charge and terminated his employment on July 1, 2004.

In response to his discharge, Craig filed a grievance with Riser on July 12, 2004, contesting his discharge and alleging various other violations of the Agreement by Riser. The grievance proceeding ultimately culminated in arbitration to decide whether Craig had impermissibly walked out of a meeting with Riser management and, thus, whether Riser validly discharged Craig for insubordination under the terms of the Agreement. An arbitrator rendered a decision on June 22, 2005, disposing of Craig's grievance under the Agreement.

IV. Craig files suit against Respondents for the commission of several state-law torts.

On July 20, 2004, Craig commenced a civil action against Respondents including *John Doe*, a fictitiously named defendant whose true name and address were unknown at the time of filing, in the Court of Common Pleas, Cuyahoga County, Ohio, for the commission of several state-law torts including libel, slander, tortious interference with an employment/contractual relationship, and civil conspiracy. (First Amended Complaint ¶¶17-80). On August 5, 2004, Craig filed a First Amended Complaint (hereinafter "FAC") with the Court of Common Pleas, correcting the names and addresses of two (2) of the Respondents.

In setting forth the state-law tort claims in his FAC, Craig specifically stated that he did *not* make the claims pursuant to a collective-bargaining

agreement (hereinafter "CBA") nor did any of the claims arise out of any rights contained therein. (FAC ¶9). In addition, the FAC contained no claims premised on federal law.

V. Respondents refuse to respond to Craig's discovery requests and remove the case to federal district court.

On August 26, 2004, Respondents, by and through counsel, removed the action to the United States District Court for the Northern District of Ohio and refused to respond to the discovery requests. (District Court Docket Item 28, Exhibit 'C'). Respondents based removal on their assertion that Craig's claims required interpretation of a CBA and, therefore, section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, preempted the claims from adjudication in state court. (*Notice of Removal* ¶¶20, 22, 25-26, 28 (District Court Docket Item 1)).

VI. Craig files motion to remand for lack of subject matter jurisdiction and the District Court denies the same.

On September 14, 2004, Craig served and filed with the District Court a *Motion in Opposition to Removal and Motion to Remand for Lack of Subject Matter Jurisdiction* (hereinafter "*Motion to Remand*"), along with a memorandum in support. (District Court Docket Item 7). The District Count entered an order denying Craig's *Motion to Remand*

on May 23, 2005.

VII. Craig repeatedly requests permission to conduct discovery and the District Court fails to answer the requests.

In the months following Craig's filing of his *Motion to Remand* and prior to the District Court reaching a decision on the same, Craig filed both a *Motion to Proceed with Discovery* and an *Amended Request for Ruling on Motion to Remand.* (District Court Docket Items 13 & 18). The District Court failed to respond to either filing until it declared them as "moot" in its decision on the *Motion to Remand.* (Order Denying Remand at 7, District Court Docket Item 20).

On July 19, 2005, Respondents filed a *Motion for a Protective Order to Stay Discovery* (hereinafter "*Motion to Stay Discovery*") and a *Motion for Summary Judgment* (hereinafter "*MSJ*"), (District Court Docket Items 25 & 27), and refused to respond to any of Craig's discovery requests until the District Court ruled on the *Motion to Stay Discovery.*[1] Craig opposed both motions. The District Court declined to rule on the *Motion to Stay Discovery* until it rendered its decision on Respondents' *MSJ*, at which

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[1] This Court should note that at no previous time had Craig been able to obtain discovery from Respondents due to Respondents' refusal to produce documents requested prior to removal and due to the District Court's subsequent continuance of the federal Case Management Conference until it ruled on the *Motion to Remand.*

time it merely held the *Motion to Stay Discovery* to be "moot". (Order Granting Summary Judgment at 7, District Court Docket Items 50-51).

VIII. The District Court awards summary judgment to Respondents.

On March 30, 2006, the District Court granted summary judgment in favor of all Respondents. (District Court Docket Items 50-51).

IX. Craig appeals the denial of his remand motion and entry of summary judgment in favor of Respondents and the Sixth Circuit denies the Parties' request for oral argument and affirms the District Court's decisions below.

On May 1, 2006, Craig filed his *Notice of Appeal* from the final judgment of the District Court with the United States Court of Appeals for the Sixth Circuit. The Parties fully briefed the matter and all Parties requested oral argument in accordance with Sixth Circuit Rule 34(a). Following the Sixth Circuit's granting of Respondents' motion for leave to file an appendix on August 23, 2006, the Parties received no further communication from the Sixth Circuit until June 4, 2007. At no time prior to June 4, 2007, did the Sixth Circuit indicate to the Parties that it would refuse their request for oral argument.

On June 4, 2007, the Sixth Circuit issued an order reciting much of the District Court's memoranda below and affirming the District Court's

decisions holding the LMRA to preempt Craig's claims against Respondents and awarding summary judgment to all Respondents. As did the District Court, the Sixth Circuit completely failed to respond to or even acknowledge any of the arguments Craig made in his briefs or acknowledge this Court's controlling decisions, such as *Lingle, infra, Hawaiian Airlines, infra,* and *Texton, infra*, even though Craig cited and discussed each of these cases in his briefs.

On July 3, 2007, Craig filed a *Petition for Rehearing* with the Sixth Circuit, alerting the court to a slew of clear factual and legal errors it made in its decision of June 4, 2007. The erroneous factual findings the Sixth Circuit made in reaching its decision, as noted in the *Petition for Rehearing*, include:

1. Its statement that Craig "originally filed this civil action in the Cuyahoga County Court of Common Pleas contesting the outcome of a dispute he had with his former employer, Riser Foods Company..." (Order at 1) even though Respondents' own admissions in their Brief (at 7), the arbitration decision Respondents previously submitted, and the docket of Matthew A. Craig v. John M. Brigadier, et al., Cuyahoga County Court of Common Pleas Case No. 04-536338, plainly show that Craig originally filed this civil action in the Cuyahoga County Court of Common Pleas long *before* he and Riser submitted a separate dispute concerning an alleged incident of insubordination to arbitration *and* even *before* Craig and Riser held the first

meeting with respect to this separate dispute.[2]

2. Its statement that Craig's termination resulted from a grievance process established by a CBA (Order at 4), even though the record contains no evidence that Craig's termination resulted from a grievance process established by a CBA, even though the arbitration decision submitted by Respondents plainly indicates that Craig did not initiate any grievance proceeding established by a CBA until *after* the termination of his employment, and even though the FAC clearly indicates that the conduct forming the basis for Craig's claims occurred *prior* to any demotion, *prior* to any discharge, and *prior* to Craig's commencement of any grievance proceeding.[3]

3. Its suggestion that Craig commenced the instant civil action to contest his termination of employment (Order at 1-2, 5-6) even though the insubordination matter Craig and Riser submitted to arbitration appears nowhere in Craig's FAC and even though Craig has *never* challenged or otherwise complained of the arbitrator's decision in this civil suit.

4. Its suggestion that the within action involves a

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[2] Thus, Craig could not have filed this civil action in the Cuyahoga County Court of Common Pleas to contest an "outcome" of a dispute with Riser because no "outcome" yet existed.

[3] Craig plainly states in his FAC that the claims first arose prior to June 25, 2004. (*See* FAC ¶¶21, 56, 60).

dispute solely between Craig and Riser even though the FAC evidences that Craig commenced the instant civil action against six (6) separate defendants, two (2) of which never had any direct connection to Riser whatsoever, and even though Craig charges only two (2) of the fourteen (14) counts set forth in the FAC against Riser.

On July 10, 2007, the Sixth Circuit denied the *Petition for Rehearing* without opinion. Craig now respectfully requests this Court to grant certiorari in the within matter to correct significant legal conflict between the Sixth Circuit's decision of June 4, 2007, and prior decisions of this Court and other circuits.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION IN THE CASE *SUB JUDICE* VASTLY EXPANDS AND CONFLICTS WITH THE PRIOR DECISIONS OF BOTH THIS COURT AND DECISIONS OF OTHER CIRCUITS HOLDING THAT THE LMRA DOES NOT PREEMPT A CLAIM UNLESS THE CLAIM REQUIRES INTERPRETATION OF TERMS OF A CBA AND THIS COURT SHOULD, THEREFORE, GRANT CERTIORARI TO RESOLVE THE CONFLICT.

Section 301 of the LMRA provides that "[s]uits for violation of *contracts between an employer and a*

labor organization...may be brought in any district court of the United States having jurisdiction..." 29 U.S.C. § 185 (emphasis added). This Court has interpreted the language and purpose of the LMRA to preempt state court adjudication of claims requiring interpretation of CBAs so as to allow the federal courts to foster uniform meanings for disputed labor-contract terms and to prevent the chaos that would likely arise by allowing the individual states to fashion their own meanings for such terms. *Allis-Chambers Corp. v. Lueck*, 471 U.S. 202, 208-12 (1985).

To effectuate the purpose of the LMRA, this Court has repeatedly held that the LMRA preempts state-law claims brought in state court by a party to a CBA from adjudication in state court *only* if the claims require interpretation of CBA terms. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988). Where adjudication of a state-law claim does not absolutely require interpretation of the meaning of a CBA term, the claim is "independent" of the CBA and is not subject to LMRA preemption. *Id.* at 409-10. Mere consultation of a CBA's terms is not sufficient to cause LMRA preemption. *Id.* at 413 n.12. Even in instances where state law creates a cause of action that is virtually identical to the nature of a claim available under a CBA, the LMRA does not preempt the state-law claim from adjudication in state court so long as there exists a possibility to reach a judgment on the claim without interpreting the meaning of any term of a CBA. *Id.* at 409-13; *Caterpillar, Inc. v. Williams*, 482 U.S. 386,

394-95 (1987). Where a plaintiff may prove claims through factual circumstances and evidence of tortious motive, rather than citation to CBA language, the claims are beyond the preemptive reach of the LMRA. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 261-62, 266 (1994); *Lingle*, 486 U.S. at 407-13.

In the context of addressing LMRA preemption, this Court has previously said that, in order for subject matter jurisdiction based on a question of federal law (e.g., interpretation of CBA terms) to exist, the plaintiff must plainly disclose the federal question on the face of the complaint. *Caterpillar,* 482 U.S. at 392. This is the "well-pleaded complaint rule". *Id.* A plaintiff is the "master" of the claims he brings against any defendant and he, alone, has the power to determine the theories under which he will sue and under what law he will bring his claims. *Lingle*, 486 U.S. at 410 n.10; *Caterpillar*, 382 U.S. at 395-99.

A limited exception to the well-pleaded complaint rule is the "complete preemption doctrine". *Caterpillar*, 382 U.S. at 393-94. The complete preemption doctrine serves to prevent a plaintiff from asserting a state law claim to enforce a CBA. *Id.* at 393-94. This Court has said that the complete preemption corollary to the well-pleaded complaint rule only applies when a complaint asserts rights created by a CBA or asserts claims substantially dependent on CBA terms. *Id.* at 394-95. This Court has further said that, despite the complete preemption doctrine, "a federal question

must [still] appear on the face of the complaint" in order for a defendant to remove the matter to federal court. *Id. at* 398-99. "[I]t is the legal character of a claim [rather than the facts underlying the claim]...that decides whether a state cause of action may go forward". *Livadas v. Bradshaw*, 512 U.S. 107, 123-24 (1994). This Court has said that the law fully entitles a plaintiff to assert only claims based on state law and, when he chooses to do so, the courts must respect this decision. *Hawaiian Airlines*, 512 U.S. at 260-66. If a plaintiff does not plead allegations sufficient to give rise to federal subject matter jurisdiction on the face of the complaint, a defendant cannot cause federal subject matter jurisdiction to exist, and thereby choose the forum for the action, by simply re-characterizing the claims the plaintiff has pled or by raising defenses created from federal law or found in a CBA. *Caterpillar*, 382 U.S. at 398-99.

In arriving at its decision in the case *sub judice*, the Sixth Circuit acknowledges that "Craig's complaint relies exclusively upon Ohio law". (Order at 3). The court then suggests that Craig's exclusive reliance on Ohio law is not determinative of federal subject matter jurisdiction in light of the "complete preemption doctrine". (*Id.*). In applying the doctrine and LMRA preemption, the Sixth Circuit concludes, without explanation, that resolution of Craig's claims "'will require a court to address relationships that have been created through the collective bargaining process and to mediate a dispute founded upon right [sic] created by a CBA'". (*Id.* at 4)

(quoting *DeCoe v. Gen. Motors Corp.*, 32 F.3d 212, 218 (6th Cir. 1994)). In so doing, the Sixth Circuit's decision is not only logically and legally inconsistent,[4] but conflicts with this Court's decisions with respect to LMRA preemption in at least three (3) significant ways.

First, the Sixth Circuit's decision sanctions, under the guise of the complete preemption doctrine, construing a complaint based exclusively upon state law as a complaint based on rights created by a CBA without identifying any particular terms of a CBA that require interpretation. As this Court has explained, the entire purpose for LMRA preemption is to allow the federal courts to foster uniform meanings for disputed labor-contract terms. *Allis Chambers*, 471 U.S. at 208-12. Holding a claim as preempted by the LMRA without identifying those CBA terms that a state court would necessarily need to interpret to resolve the claim fails to advance the purpose of LMRA preemption and needlessly interferes with states' interests in governing the relationships among those within their boundaries. Here, the courts below have utterly failed to cite to any provisions of a CBA that govern Craig's claims whatsoever.

Second, the Sixth Circuit's decision indicates that a court's finding that it will need to "address the relationships that have been created through the

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[4] The Sixth Circuit's decision is logically and legally inconsistent in that, if Craig bases his claims "exclusively" upon Ohio law, he does not base his claims upon rights created by a CBA.

collective bargaining process" in order to resolve a claim is a sufficient substitution for this Court's requirement that a claim require interpretation of CBA terms in order for a court to impose LMRA preemption. Thus, in the Sixth Circuit's view, the mere existence of a collective bargaining relationship between parties is sufficient to entangle any claims between the parties in the quagmire of LMRA preemption. Again, this Court has said that the LMRA does not preempt claims that do not actually require interpretation of CBA terms. *Hawaiian Airlines*, 512 U.S. at 262-63; *Livadas*, 512 U.S. at 123-24; *Lingle*, 486 U.S. at 407-13. Mere consultation of CBA terms is not enough, and LMRA preemption does not arise merely because the plaintiff employee is a party to a CBA with the defendant employer. *Lingle*, 486 U.S. at 413 n.12; *Caterpillar*, 482 U.S. at 397 n.10.

Third, the Sixth Circuit's decision holds that the LMRA preempts Craig's claims even though his libel, slander, tortious interference, and civil conspiracy claims fail to indicate, on their face, that they rely on the terms of a CBA for their resolution and even though they do not *require* interpretation of a CBA for their resolution. This Court should first observe that Craig expressly states in his FAC that he premises none of the claims contained therein upon rights of a CBA. In fact, the only instances in which Craig even mentions a CBA in the FAC is in paragraph nine, where he expressly states that "*none of the causes of action being alleged hereunder are covered by or subject to the collective bargaining*

agreement," and in paragraph sixteen, where he acknowledges for factual background purposes, his involvement in an alternative dispute resolution process concerning certain contractual violations that he expressly excludes from this suit (emphasis added). Craig makes no other reference to a CBA at any other place in the FAC, which contains fourteen separate counts/claims against six individual defendants.[5]

Aside from Craig's express denial in his FAC that he premises any of his claims on a CBA and the FAC's plain lack of reference to CBA provisions, the FAC plainly sets forth defamation, tortious interference, and civil conspiracy tort claims based entirely on state law. *Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 61-67 (1977) (the right to be free of defamation is a right created by state law, not a CBA); *Dryden v. Cincinnati Bell Tel. Co.*, 135 Ohio App.3d 394, 400-03, 734 N.E.2d 409 (1st Dist. 1999) (the rights to be free of defamation and tortious interference with employment are rights created by state law, not a CBA). *Laurel Valley Oil Co. v. 76 Lubricants Co.*, 154 Ohio App.3d 512 (5th Dist. 2003) (civil conspiracy as cognizable under state tort law).

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[5] Craig asserts only two (2) of the fourteen (14) counts/claims against Riser and he expressly premises liability on these claims on ratification of intentional torts by Riser's employees. (FAC ¶¶52, 76). Craig never mentions discharge of employment in these counts/claims. (*See Id.*).

To establish a claim for libel (or slander) under state tort law, a plaintiff must show the existence of: (1) a false and defamatory statement; (2) in written (or oral) form; (3) that is published without privilege to a third person; (4) fault of the publisher for making the publication and; (5) in some instances, damages sustained therefrom. *Lawson v. AK Steel Corp.*, 121 Ohio App.3d 251, 256, 699 N.E.2d 951 (12th Dist. 1997); *Franks v. The Lima News*, 109 Ohio App.3d 408, 412, 672 N.E.2d 245 (3d Dist. 1996).

To establish a claim for tortious interference with an employment/contractual relationship under state tort law, a plaintiff must show the following: (1) the existence of an employment relationship or contract; (2) the wrongdoer's awareness of the existence of the relationship/contract; (3) the wrongdoer's intentional interference with the relationship/contract so as to induce or otherwise cause a discontinuance thereof;[6] (4) lack of

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[6] Ohio courts have interpreted this element as requiring a showing of the "action taken" or "intent" by the wrongdoer to procure non-performance of a contract or discontinuance of the relationship by a third person rather than a showing of actual breach. *See, e.g., Brookeside Ambulance, Inc. v. Walker Ambulance Serv.*, 112 Ohio App.3d 150, 155-57, 678 N.E.2d 248 (6th Dist. 1996); *Dryden*, 135 Ohio App.3d at 400; *Doyle v. Fairfield Mach. Co., Inc.*, 120 Ohio App.3d 192, 215-17, 697 N.E.2d 667 (11th Dist. 1997). Moreover, a plaintiff may prove tortious interference with an *employment* relationship even where no contract exists. *See Doyle*, 120 Ohio App.3d at 215-17. Craig has clearly alleged tortious interference with the employment relationship between himself and

justification for the interference and; (5) resulting damages. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 707 N.E.2d 853 (1999).

To state a claim for civil conspiracy under state tort law, a plaintiff must show the existence of: (1) a malicious combination; (2) of two or more persons; (3) to injure another in person or property; (4) in a way not competent for one alone; (5) which results in actual damages. *Laurel Valley Oil*, 154 Ohio App.3d at 520.

None of the elements of these claims turns on the meaning of CBA terms. Rather, these elements are products of purely factual inquiries, such as the actions taken by Respondents, the motives underlying those actions, and the underlying factual circumstances.

Several courts of appeals confirm that the LMRA does not preempt defamation and tortious interference with employment claims. *See, e.g.*, *Lopez v. Fox Television Animation, Inc.*, 76 Fed. Appx. 769 (9th Cir. 2003) (court held that the LMRA did not preempt a terminated employee's defamation claim against his employer); *Dashields v. Robertson*, 2000 U.S. App. LEXIS 9533 (4th Cir. 2000) (court held that the LMRA did not preempt a unionized employee's defamation and tortious interference claims against several coworkers); *Meyer v. Schnucks Markets, Inc.*, 163 F.3d 1048 (8th Cir. 1998) (court held that the LMRA did not preempt a unionized employee's defamation and tortious

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Riser. (FAC ¶¶63-74).

interference claims against a coworker and employer); *Graham v. Contract Transp., Inc.*, 220 F.3d 910 (8th Cir. 2000) (defamation claims not preempted); *Gay v. Carlson*, 60 F.3d 83 (2d Cir. 1995) (court found that a terminated employee's defamation and civil conspiracy claims against several coworkers arose from state law rights and did not require interpretation of a CBA); *see also Dryden*, 135 Ohio App.3d at 399-403 (holding that the LMRA did not preempt a terminated employee's defamation or tortious interference claims against former coworkers). In holding the LMRA to preempt Craig's defamation and tortious interference claims, the Sixth Circuit enters into a direct conflict with decisions of its sister circuits in addition to conflict with this Court.

Despite the Sixth Circuit's suggestion otherwise, not only has an arbitrator never decided the above claims against Respondents herein, but empowered her to do so. There is no evidence of a CBA involved here that contains a procedure for remedying torts committed by members of UFCW against co-members of the same, nor is there evidence of a procedure for remedying Riser's ratification of intentional torts by its employees.[7] Moreover, even if a CBA provided for such procedures, a CBA may not be the "only source" of an employee's rights in the workplace. *Hawaiian Airlines*, 512 U.S. at 258-62. State law may place

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[7] Again, this Court should remain mindful that the LMRA applies only to CBA disputes between labor unions and employers. 29 U.S.C. § 185.

additional, separate rights and duties upon those involved in a collective-bargaining relationship and this Court has consistently rejected the notion that an individual may not vindicate these separate and independent rights in state court where he has an alternative remedy available under a CBA. *See, e.g., Hawaiian Airlines*, 512 U.S. at 257-66; *Lingle*, 486 U.S. at 407-13.

In *Hawaiian Airlines*, for example, Hawaii law placed an additional and separate duty on the defendant employer to not discharge its employees in violation of public policy. 512 U.S. at 258-62. Likewise, Ohio places a separate body of rights and duties on those within its territorial limits that a CBA may not impede or diminish. Here, Craig had a state law right to be free from defamation, to not have his employment/contractual relationship tortiously interfered with by others, and a right to not be tortiously conspired against. Respondents herein had a corresponding duty under state law to not defame, to not tortiously interfere, to not ratify thetortious conduct of another, and to not engage in a civil conspiracy to tortiously injure another.

In rendering its decision below, the Sixth Circuit lost sight of the separate body of rights Ohio grants to those within its boundaries. The Sixth Circuithas lost sight of the independent nature of such rights for some time now with respect to defamation and tortious interference claims. For example, in *DeCoe, supra*, one of the most consistently cited cases in the Sixth Circuit with respect to LMRA preemption, the Sixth Circuit held

that the LMRA preempted an employee's defamation and tortious interference claims against his employer and several co-workers for allegedly falsely accusing him of committing sexual harassment upon several co-workers. *Id.* at 214-15. Even though the face of the plaintiff's complaint made no indication that the plaintiff based his claims on a CBA,[8] the *DeCoe* court delve into a CBA to locate terms that the defendant might have raised as a defense, or that might have required interpretation if the plaintiff had pled his claims differently, to determine if a court could resolve the claims without interpreting CBA terms. The impact of the *DeCoe* decision has been widespread, encouraging district courts to automatically hold defamation and tortious interference claims as preempted without regard to CBA terms or the independent nature of such claims.[9] For example, the district court below concluded: "in...[*DeCoe*]...the discharged...[plaintiff] raised claims such as defamation, [and] tortuous interference... The Sixth Circuit upheld the finding of preemption in...[that case]; the provisions of the LMRA must likewise govern the resolution of...[Craig's] claims". (Order Awarding Summary Judgment at 6, District Court Docket Items 50-51).

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[8] See Appendix at 13.

[9] The widespread impact is especially significant when considering that only the Ninth Circuit surpasses the Sixth Circuit in the number of cases involving the LMRA. Administrative Office of the United States Courts, *2006 Annual Report of the Director, Table B-7.*

The Sixth Circuit's decision in the case *sub judice* and *DeCoe* are neither anomalies within the Circuit nor anomalies among the several other circuits. *See, e.g., Campbell v. Kane, Kessler, P.C.*, 144 Fed. Appx. 127 (2d Cir. 2005); *Shiflett v. I.T.O. Corp. of Baltimore*, 202 F.3d 260 (4th Cir. 2000); *Papa v. Truland Systems Corp.*, 162 F.3d 1155 (4th Cir. 1998); *Kern v. Dannon Co., Inc.*, 71 Fed. Appx. 442 (5th Cir. 2003); *Collins v. Bradley*, 122 F.3d 1067 (5th Cir. 1997); *Potts v. Wilson*, 54 Fed. Appx. 190 (6th Cir. 2002); *Rafig v. A.H. Belo Corp.*, 203 F.3d 832 (9th Cir. 1999) (holding defamation claims preempted); *Turner v. American Fed. of Teachers Local 1565*, 138 F.3d 878 (11th Cir. 1998) (holding tortious interference claim as preempted); *but see* cases cited *supra*.

The much of the conflict between the decisions in the above cases arises from the construction of conclusions rather than application of facts to an exacting legal test. More than thirteen (13) years ago, in the last decision this Court rendered that discussed LMRA preemption in any significant detail, this Court acknowledged the lack of uniformity among the circuits in their application of the principles this Court set forth in *Lingle* and *Allis-Chambers*. *See Livadas*, 512 U.S. at 124 n. 18. There, this Court determined that the facts of that case did not render the matter a fit occasion to resolve the conflict among the circuits with respect to LMRA preemption because, there, non-preemption by the LMRA was "clear beyond peradventure". *Id.* Petitioner submits that the case

sub judice presents a fit occasion for this Court to resolve the continuing chaotic conflict between and within the circuits and to correct the numerous decisions conflicting with this Court through the adoption of a more definitive test for LMRA preemption.[10]

II. THE SIXTH CIRCUIT'S CONCLUSION THAT "EXAMINING THE EXISTENCE AND (POTENTIALLY) THE SEVERITY" OF THE HARM OF DISCHARGE WILL "REQUIRE THE COURT TO EVALUATE THE PARAMETERS FOR PROPER AND IMPROPER DISCHARGE" UNDER A CBA AND, THEREBY, GIVE RISE TO LMRA PREEMPTION DIRECTLY CONFLICTS WITH THIS COURT'S PRIOR DECISIONS AND THIS COURT SHOULD, THEREFORE, GRANT CERTIORARI TO RESOLVE THE CONFLICT.

In arriving at its decision in the case *sub judice*, the Sixth Circuit not only completely misstates the facts in asserting that all of Craig's tort claims allege harm of demotion and discharge (Order at 1), but then goes on to formulate a legal conclusion that directly conflicts with this Court's

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[10] The cases cited immediately above represent cases decided since this Court's decision in *Livadas*.

prior holdings under any set of facts.[11] According to the Sixth Circuit, as part of its justification in holding Craig's claims as preempted by the LMRA, "examining the existence and (potentially) the severity" of the harm of discharge will "require the court to evaluate the parameters for proper and improper discharge" under a CBA and, thereby, give rise to LMRA preemption. (Order at 4). However, this Court has repeatedly rejected the Sixth Circuit's conclusion that an allegation in a complaint of harm of termination of unionized employment requires an evaluation of the parameters for proper and improper discharge under a CBA. *See, e.g., Hawaiian Airlines*, 512 U.S. at 266 (the Court rejected the notion that examining the existence of discharge requires interpretation of a CBA and found that the existence of discharge was a "purely factual question," citing *Lingle*, 486 U.S. at 407).

This Court has likewise rejected the notion that determining the severity of harm caused by discharge from employment (i.e., value of lost wages caused by the event of discharge) requires interpretation of a CBA sufficient to cause preemption by the LMRA. *Livadas*, 512 U.S. at 124-25 ("when liability is governed by independent state law, the mere need to 'look to' the [CBA] for damages computation is no reason to hold the state-law claim

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[11] On review of the FAC, though, only the tortious interference and civil conspiracy claims (counts 10-14 of the FAC) allege harm of demotion and discharge. Contrary to the assertions of the lower courts, *none* of Craig's libel and slander claims alleges such harm.

defeated by [the LMRA]"); *Lingle*, 486 U.S. at 413 n.12 (although federal law would govern any interpretation of CBA terms when calculating the damages due on an employee's state-law claim, the underlying state-law claim would stand).

Although Craig's tortious interference with employment and civil conspiracy claims allege damages that include discharge from employment, Craig seeks monetary damages for these claims rather than remedies under a CBA, such as reinstatement of employment. Craig makes no statement in his FAC that Riser improperly terminated his employment under a CBA. Moreover, this Court's decisions in cases such as *Lingle*, *supra*, and *Hawaiian Airlines*, *supra*, involving employees who brought actions in state court against their former employers for wrongful discharge based on state law,[12] support the notion that federal labor law entitles a jury to find that improper/tortious motive under state law resulted in discharge irrespective of whether an employer was justified under a CBA in discharging an employee. These decisions further demonstrate the fallacy of the Sixth Circuit's assertion that Craig's allegation of harm from demotion and discharge causes the LMRA to preempt his claims and further demonstrate the need to correct the Sixth Circuit's decision in the

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[12] While *Hawaiian Airlines* involved the Railway Labor Act rather than the LMRA, the Court explicitly adopted the preemption standard for the LMRA set forth in *Lingle* for determining preemption under the Railway Labor Act. 512 U.S. at 261-66.

case *sub judice*.[13]

II. THE SIXTH CIRCUIT'S CONCLUSION THAT EVALUATION OF RESPONDENTS' IMPROPER MOTIVE OF ATTEMPTING TO "'OBTAIN A MORE LAX WORKING ENVIRONMENT FOR JOHN M. BRIGADIER' WILL REQUIRE THE COURT TO ASSESS THE PARAMETERS OF THE CURRENT WORKING ENVIRONMENT AND THE FUNCTIONING OF VARIOUS GRIEVANCE PROCEDURES" UNDER A CBA AND, THEREFORE, RESULT IN LMRA PREEMPTION OF ALL OF CRAIG'S CLAIMS DIRECTLY CONFLICTS WITH THIS COURT'S PRIOR DECISIONS AND THIS COURT SHOULD, THEREFORE, GRANT CERTIORARI TO RESOLVE THE CONFLICT.

In holding the LMRA to preempt Craig's claims, the Sixth Circuit enters into another direct conflict with this Court's prior decisions. Referring to Craig's statement in his FAC that John M. Brigadier's, Sue M. Brigadier's, and David L.

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[13] If the Sixth Circuit's assertion were true, then the LMRA would have also preempted the claims involved in *Lingle* and *Hawaiian Airlines* because, as the claims in those cases were "wrongful discharge" claims, an allegation of harm from *discharge* would have been essential to the claims.

Brigadier's motive for tortiously interfering with the employment relationship between Craig and Riser was to "obtain a more lax working environment" for John M. Brigadier, the Sixth Circuit concludes that proof of this motive would "require the court to assess the parameters of the current working environment and the functioning of various grievance procedures" created by a CBA. (Order at 4). However, the Sixth Circuit's conclusion is erroneous because such an assessment of the actual conditions of the working environment and the functioning of grievance procedures for resolution of disputes between Riser and union members would be irrelevant to establishing the existence of the improper motive.[14] In fact, this Court has repeatedly said that showing the existence of an improper motive is a factual inquiry and does not require interpretation of a CBA. *Hawaiian Airlines*, 512 U.S. at 261-66; *Lingle*, 486 U.S. at 407-13.[15] Accordingly,

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[14] Again, just as the libel and slander claims fail to allege harm of discharge, the libel and slander claims in the FAC also fail to contain the "obtain a more lax working environment" statement.

[15] In both *Hawaiian Airlines* and *Lingle*, the plaintiffs alleged improper motive of the defendants in their complaints for wrongful discharge against the defendants. In Ohio, presumably like Hawaii and Illinois, a complaint for wrongful discharge in violation of public policy must contain an allegation of improper motive. *See, e.g., Lewis v. Fairview Hosp.*, 156 Ohio App.3d 387, 391-92, 806 N.E.2d 185 (8th Dist. 2004) (indicating that a plaintiff must demonstrate improper motive for a wrongful discharge claim under state tort law); see also *Fred Siegel*, 85 Ohio St.3d at 171-79 (indicating that a plaintiff must demonstrate the

this Court should grant certiorari to resolve this clear conflict.

IV. THE SIXTH CIRCUIT'S DECISION HOLDING THAT THE LMRA PREEMPTED CRAIG'S CLAIMS AGAINST PERSONS WHO HAD NO RELATIONSHIP WITH UCFW NOR RISER WHATSOEVER IS PATENTLY CONTRARY TO THE LANGUAGE OF THE LMRA, INTERPRETATION OF THE LMRA BY THIS COURT AND OTHER CIRCUITS, AND FUNDAMENTAL CONCEPTS OF CONTRACT LAW, AND THIS COURT SHOULD, ACCORDINGLY, GRANT CERTIORARI TO CORRECT THE SAME.

The notion that the LMRA cannot preempt a claim against a defendant where the defendant is not a party to a CBA should not come as a difficult concept. After all, the LMRA applies only to "[s]uits for violation of *contracts between an employer and a labor organization*," and one cannot breach an agreement that does not bind him/her. 29 U.S.C. § 185 (emphasis added); *Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 897-98 (4th Cir. 1992). Accordingly, logic dictates and several circuit courts have held that

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existence of an unjustifiable motive for tortious interference with a contractual relationship claim under state tort law).

federal courts do not have jurisdiction under the LMRA to entertain claims against persons who are not parties to a CBA. *Covenant Coal Corp.*, 977 F.2d at 897.

Here, Craig set forth several state law tort claims against Sue M. Brigadier and David L. Brigadier separately from claims against any of the other Respondents in this action.[16] Respondents do not dispute that neither Sue M. Brigadier nor David L. Brigadier had any form of employment, business, or contractual relationship with Riser.[17] Consequently, the Sixth Circuit could not have legally nor logically construed the LMRA to preempt the claims asserted against Sue M. Brigadier and David L. Brigadier in the FAC. In construing the LMRA to preempt Craig's claims against Sue M. Brigadier and David L. Brigadier, the Sixth Circuit has entered into direct conflict with doctrine of this Court and decisions of other circuits that necessarily requires resolution by this Court.

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[16] See Counts 2, 3, and 11 of the FAC.

[17] *See Defendants' Amended Answer to Plaintiff's First Amended Complaint* at ¶68 (admitting that neither Sue M. Brigadier nor David L. Brigadier had any form of employment, business, or contractual relationship with Riser).

V. THE STANDING POLICY OF THE SIXTH CIRCUIT AND SEVERAL OTHER CIRCUITS OF DENYING ORAL ARGUMENT TO PRO SE LITIGANTS RUNS AFOUL OF 28 U.S.C. § 1654, FED. R. APP. P. 34(a), PRIOR DECISION OF THIS AND OTHER COURTS, THE NOTION OF EQUALITY UNDER THE LAW, EQUAL ACCESS TO THE COURTS, AND CONFLICTS WITH OTHER CIRCUITS' IMPLEMENTATION OF FED. R. APP. P. 34(a) SUCH THAT THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE SAME.

Of separate, but no less significant, concern in the case *sub judice* is the Sixth Circuit's denial of the Parties' request for oral argument. At issue here are 28 U.S.C. § 1654, Fed. R. App. P. 34(a)(2), and the Sixth Circuit's consistent practice of prohibiting oral argument in cases involving pro se litigants.

Deeply rooted in the history of this republic and expressed in 28 U.S.C. § 1654 is the notion that a litigant may personally conduct his own case in court. *Faretta v. California*, 422 U.S. 806, 830 n.39 (1975); *O'Reilly v. New York Times Co.*, 692 F.2d 863, 867 (2d Cir. 1982). 28 U.S.C. § 1654, entitled "Appearance personally or by counsel," provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." The Federal Rules of Appellate Procedure further

acknowledge self-representation in the United States Courts of Appeals. *See, e.g.*, Fed. R. App. P. 3(c)(2) and (d)(1).

Found within the right of self-representation is the general right of litigants to orally present their own cases to courts on appeal. *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005). Fed. R. App. P. 34(a)(2) supports this general right and provides:

> **Standards.** Oral argument *must be allowed in every case* unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:
>
> (A) the appeal is frivolous;
>
> (B) the dispositive issue or issues have been authoritatively decided; or
>
> (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Fed. R. App. P. 34(b) further provides: "**Notice of Argument; Postponement.** The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date, time, and place for it, and the time allowed for each side. [...]" (emphasis added).

As noted in the facts above, all Parties in the case *sub judice* properly requested oral argument

pursuant to Sixth Circuit Rule 34(a). However, as also indicated above, the clerk of the Sixth Circuit failed to advise the Parties "whether oral argument [would] be scheduled" as required by Fed. R. App. P. 34(b). Craig did not learn that the Sixth Circuit would not permit him oral argument until the court stated the same in its decision affirming the decision of the District Court.

As Craig noted in his request for oral argument, made pursuant to Sixth Circuit Rule 34(a), "the existence of federal subject matter jurisdiction in the wake of an allegation of LMRA preemption is an exceedingly complex area of the law," especially deserving of oral advocacy. (Brief of Plaintiff-Appellant, Appendix 'A') (citing *Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25*, 430 U.S. 290, 295-96 (1977); *Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 10 (1st Cir. 1999); *Foy v. Pratt & Whitney Group*, 127 F.3d 229, 233 (2d Cir. 1997); *Wilds v. UPS, Inc.*, 262 F. Supp. 2d 163, 184-85 (S.D.N.Y. 2003)). At least one court of appeals has described the LMRA preemption inquiry as "one of the most confused areas of federal court litigation". *See Galvez v. Kuhn*, 933 F.3d 773, 776 (9th Cir. 1991) (citing Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209, 209 (1989)). Craig requested oral argument in particular to "elaborate on the summary of his position...clarify whatever questions [the Sixth Circuit] may have with respect to his contentions...[and] clear up any lingering

misconceptions with respect to [his] claims...". (Brief of Plaintiff-Appellant, Appendix 'A'). On review of th practices of the Sixth Circuit, though, it is all but certain that the Sixth Circuit would not have permitted Craig to orally argue his case under any set of circumstances.

Although Fed. R. App. P. 34(a) makes no distinction between represented litigants and those appearing pro se, and even though Congress has evidenced its intent to eliminate any such distinction through enactment of 28 U.S.C. § 1654, the Sixth Circuit has consistently differentiated between cases involving pro se litigants and those where no party is pro se. The Administrative Office of the United States Courts reports that seven hundred fifty-one (751) private party civil cases terminated on the merits in the Sixth Circuit Court of Appeals between April 1, 2005, and March 31, 2006.[18] The vast majority of these cases, four hundred ninety-six (496), terminated following oral argument and two hundred fifty-five (255) of the cases terminated following submission on the briefs.[19] Upon investigation, Craig has discovered that, of the (751) private party civil cases terminating on the merits,

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[18] Administrative Office of the United States Courts, *2006 Federal Judicial Caseload Statistics, Table B-1.* Craig used this time period for demonstrative purposes and has no reason to believe that the Sixth Circuit has been more receptive to oral argument in cases involving pro se litigants during any other time period.

[19] *Id.*

only eighty-five (85) of the cases terminated following the Sixth Circuit's denial of oral argument pursuant to Sixth Circuit Rule 34(j).[20] Of the eighty-five (85) cases in which the Sixth Circuit refused to hear oral argument, eighty-three (83) of the cases involved pro se litigants.[21] In fact, Craig has uncovered only a single instance in the referenced year where the Sixth Circuit heard oral argument in a case involving a pro se litigant.[22] Craig has uncovered no cases in which the Sixth Circuit denied oral argument where all parties indicated a desire for oral argument and where all parties had obtained counsel.

In many of the cases where the Sixth Circuit

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[20] See Appendix at 31. Sixth Circuit Rule 34(j) is similar to Fed. R. App. P. 34(a) except that it liberalizes the court's ability to deny oral argument in cases beyond that permitted by Fed. R. App. P. 34(a). Whereas Fed. R. App. P. 34(a) states that oral argument "*must* be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary" for one of three (3) specified reasons, Sixth Circuit Rule 34(j)(1) permits the aforesaid panel to deny oral argument *without* the requirement of finding one of the three (3) specified reasons and Sixth Circuit Rule 34(j)(2) merely states that oral argument will "ordinarily" be allowed unless someone (the rule does not specify who) finds that one of the three (3) specified reasons applies. (emphasis added).

[21] *Id.* In the two cases not involving pro se litigants, one or both of the parties expressed a desire that the court not hold oral argument. See Sixth Circuit docket numbers 04-3304 and 04-6120.

[22] See Sixth Circuit docket number 05-1155.

denied oral argument to pro se litigants, the Sixth Circuit based its denial on Sixth Circuit Rule 34(j)(2)(C), which states that "[t]he facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument".[23] Sixth Circuit Rule 34(h)(1) states that oral argument "should undertake to emphasize and clarify the written argument appearing in the briefs". Pro se litigants are precisely those persons who are most *unlikely* to adequately present the facts and legal arguments in their briefs and are the persons most likely to benefit from an opportunity to emphasize and clarify the written arguments appearing in their briefs. Thus, true application of the standards set forth by Fed. R. App. P. 34(a) and Sixth Circuit Rule 34(j)(2)(C) would reveal that the vast majority of private civil cases terminating after oral argument involved pro se litigants. However, the statistics reveal but a disingenuous application.

Aside from the raw numbers, Sixth Circuit Internal Operating Procedure Rule 34(c) evidences a general exclusion of pro se litigants from the oral argument process.[24] The Sixth Circuit is not alone

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[23] In the case *sub judice*, the Sixth Circuit denied oral argument pursuant to Sixth Circuit Rule 34(j)(1) and completely failed to indicate which of the three (3) permissible reasons set forth in Fed. R. App. P. 34(a) it relied upon in denying oral argument.

[24] Here, the Sixth Circuit refers exclusively to "counsel" instead of the term "party," as used throughout the Sixth Circuit's other rules.

in its refusal to afford the same consideration to pro se litigants as it does those with counsel. For example, Fourth Circuit Rule 46(f) states that "[c]ases involving pro se litigants are ordinarily not scheduled for oral argument" despite Fed. R. App. P. 34(a)'s requirement that all cases proceed to oral argument "unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary" for one of three (3) specified reasons. Rather than requiring "a panel of three judges who have examined the briefs and record" to unanimously agree that "oral argument is unnecessary," as set forth by Fed. R. App. P. 34(a), Eight Circuit Rule 34(A) permits a clerk or senior staff attorney to screen out cases for disposition without oral argument. In contrast, the Second Circuit has expressly embraced oral argument by pro se litigants. *See Tindall*, 414 F.3d at 286; Second Circuit Rule 34 (expressly providing each pro se litigant an opportunity to elect to orally argue the case and granting all parties an opportunity to request reconsideration of a panel's unanimous sua sponte decision not to hear oral argument in accordance with Fed. R. App. P. 34(a)).[25]

The hard numbers and facts are impossible to ignore and readily evidence disparate treatment toward those who cannot afford counsel or who choose to not hire counsel when attempting to

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[25] Second Circuit Rule 34 has some room for correction, though, because it still affords lesser deference to cases involving pro se litigants by lessening the time for oral argument in those cases.

resolve disputes through the judicial system. The very same panel deciding the case below has described oral argument as a "benefit".[26] Had the Sixth Circuit afforded Craig the same benefit that it would have afforded him had his name not carried the pro se label, the court may have been less inclined to "rubber stamp" the District Court's decision below and all of the factual and legal errors contained therein.

Craig submits that the practice of the Sixth Circuit and other circuits of allowing oral argument "only for attorneys," as Craig recalls the case manager saying when discussing oral argument not long after filing his *Notice of Appeal* below, is unjust, defies the express policy set forth by Congress, defies the policy set forth in the Federal Rules of Appellate Procedure, and conflicts with the policies of other circuits in implementing the aforesaid Federal Rules. Accordingly, Craig respectfully requests that this Court grant certiorari so that the process of washing away this scarlet letter wrongfully imposed upon litigants without an attorney may begin.

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[26] See Zbuka v. Marathon Ashland Petroleum, LLC, No. 06-4314, p. 2 (6th Cir. June 25, 2007).

Respectfully submitted,

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APPENDIX

Case No: 06-3607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

MATTHEW A. CRAIG

Plaintiff - Appellant

FILED
JUL 10 2007
LEONARD GREEN, Clerk

v.

JOHN BRIGADIER; SUE M. BRIGADIER; DAVID L. BRIGADIER; JACQUELYN F. LENSON; RISER FOODS COMPANY, d/b/a Giant Eagle, Inc.

Defendants – Appellees

BEFORE: GILMAN, GIBBONS and GRIFFIN, Circuit Judges.

Upon consideration of appellant's motion to file instanter the petition for panel rehearing,

It is ORDERED that the motion be and hereby is GRANTED.

And after further consideration of the petition for rehearing filed by appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER OF THE COURT

/s

Leonard Green, Clerk

NOT RECOMMENDED
FOR FULL-TEXT PUBLICATION

No. 06-3607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 04 2007
LEONARD GREEN, Clerk

MATTHEW A. CRAIG, Plaintiff-Appellant,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
v.	)	
	)	

ORDER

Before: GILMAN, GIBBONS, and GRIFFIN, Circuit Judges.

Matthew A. Craig appeals pro se a district court judgment that dismissed his civil action, which was removed from an Ohio state court pursuant to 28 U.S.C. §1441. This case has been referred to a panel of the court pursuant to Rule 34G)(l), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not

needed. Fed. R. App. P. 34(a).

Craig originally filed this civil action in the Cuyahoga County Court of Common Pleas contesting the outcome of a dispute he had with his former employer, Riser Foods Company, d/b/a Giant Eagle, Inc. (Giant Eagle). Essentially, Craig asserted claims of defamation, slander, libel, conspiracy, and tortious interference with contract - torts which allegedly caused him harm in that they resulted in his demotion and termination as a Giant Eagle employee. The defendants alleged federal jurisdiction over Craig's claims under the Labor Management Relations Act (LMRA), 29 U.S.C. § 158(a), and removed the case to the United States District Court for the Northern District of Ohio. Craig's subsequent motion to remand the case to the state court was denied after the district court found that Craig's claims were properly read as claims for improper discipline and

discharge under the collective bargaining agreement (CBA), and thus pre-empted under § 301 of the LMRA.

Thereafter, Giant Eagle filed a motion for summary judgment which the district court granted. In so ruling, the district court found that Craig's claims were preempted by § 301 of the LMRA, and that the arbitrator's finding that Giant Eagle properly terminated Craig for insubordination under

the terms ofthe CBA precluded judicial review. This appeal followed.

Craig reasserts his argument that remand is proper. Giant Eagle's removal was predicated upon federal question jurisdiction in that Craig's claims purportedly arose under § 301 of the LMRA, rather than Ohio law. In reviewing the district court's denial of Craig's motion to remand, this court looks to the complaint at the time of removal, reviews the denial of the motion to remand de novo, and determines whether the action was properly removed in the first place. *See Ahearn* v. *Charter Twp. of Bloomfield,* 100 F.3d 451,453 (6th Cir. 1996). "Removing defendants bear the burden of establishing federal subject-matter jurisdiction." *Id.* at 453-54.

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar, Inc.* v. *Williams,* 482 U.S. 386, 392 (1987). To be removable based upon federal question jurisdiction, generally the complaint must affirmatively allege a federal claim. *See Beneficial Nat'l Bank* v. *Anderson,* 539 U.S. 1,6 (2003). Federal courts examine the well-pleaded allegations of the complaint for a federal question on its face, and ignore potential defenses, *id.,* "including the defense of pre-emption, even if the defense is anticipated in the plaintiff s complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar, Inc.,* 482 U. S. at 393. Since a plaintiff is the master of his complaint, *see AmSouth Bank* v. *Dale,* 386 F.3d 763, 776 (6th Cir. 2004), where a

choice is made to assert only a state-law claim, the general rule prohibits recharacterizing it as a federal claim for removal purposes. *See Metro. Life Ins. Co.* v. *Taylor,* 481 U.S. 58, 63 (1987). Federal jurisdiction can therefore generally be avoided by relying exclusively on state law. *See Smolarek* v. *Chrysler Corp.,* 879 F.2d 1326, 1329 (6th Cir. 1989) (en banc).

The face of Craig's complaint relies exclusively upon Ohio law. However, one limited exception to the general rule is "when a federal statute wholly displaces the state-law cause of action through complete pre-emption." *Beneficial Nat'l Bank,* 539 U.S. at 8. This narrow exception to the well-pleaded complaint rule, known as the "complete preemption" doctrine, occurs where "Congress [has] so completely preempt[ed] a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metro. Life, Ins. Co.* , 481 U.S. at 63-64. When Congress has indicated an intent to completely occupy the field, any seemingly state-law claim is in fact a federal claim for purposes of federal question jurisdiction. *Beneficial Nat'I Bank,* 539 U.S. at 9. "[A]ny claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar, Inc.,* 482 U.S. at 393; *see also Franchise Tax Bd. of Cal.* v. *Constr. Laborers Vacation Trust for S.Ca!.,* 463 U.S. 1,24 (1983)

(noting that "if a federal cause of action completely pre-empts a state cause of action[,] any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law").

As the party invoking removal, Giant Eagle relies upon the LMRA. Section 301 of the LMRA is a statute under which the Supreme Court has recognized complete preemption. *See, e.g., Allis Chalmers Corp.* v. *Lueck,* 471 U.S. 202, 209-11 (1985) (citing *Local* 174, *Teamsters, Chauffeurs, Warehouseman & Helpers of Am.* v. *Lucas Flour Co.,* 369 U.S. 95, 103 (1962); *Avco Corp.* v. *Aero Lodge No.* 735, *Int'l Assoc. of Machinists & Aerospace Workers,* 390 U.S. 557, 55961 (1968) (citing *Textile Workers Union of Am.* v. *Lincoln Mills,* 353 U.S. 448,456-57 (1957)). This court has noted that § 301 has an unusually powerful preemptive force over a claim for relief sought exclusively under state law. *Alongi* v. *Ford Motor Co.,* 386 F.3d 716, 723-24 (citing *Beneficial Nat'l Bank,* 539 U:S. at 7).

Section 301 of the LMRA provides that "[s]uits for a violation of contracts between an employer and a labor organization representing employees ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a). The statute serves to

preempt state-law claims for what are in actuality suits for violation of contracts between an employer and a labor organization. *Caterpillar, Inc.*, 482 U.S. at 394.

To determine whether a state-law claim is sufficiently "independent" to survive § 301 preemption, this court has adopted a two-step inquiry. *DeCoe* v. *Gen. Motors Corp.*, 32 F.3d 212, 216-17 (6th Cir. 1994). First, courts must determine whether resolving the state-law claim would require interpretation of the terms of the CBA. If so, the claim is preempted. Second, courts must ascertain whether the rights claimed by the plaintiff were created by the CBA, or instead by state law. *Id.* at 216. If the rights were created by the CBA, the claim is preempted. In short, if a state law claim fails *either* of these two requirements, it is preempted by § 301.

Using the approach established in *DeCoe*, we conclude that preemption was warranted in this case and that removal was proper. First, the resolution of Craig's claims "will require a court to address relationships that have been created through the collective bargaining process and to mediate a dispute founded upon right created by a CBA." *Id.* at 218 (quoting *Jones* v. *Gen. Motors, Corp.*, 939 F.2d 380,382-83 (6th Cir. 1991). As stated by the district court,

> Craig complains of defamation, slander, and libel- torts which allegedly caused him harm in that they resulted in his demotion and termination. Examining the existence and (potentially) the

> severity of this harm will evidently require the court to evaluate the parameters for proper and improper discharge. Craig claims tortious interference with his employment and with his contractual relationship with Giant Eagle (as well as conspiracy to interfere). Evaluation of the defendants' alleged attempts to "obtain a more lax working environment" for John Brigadier will require the court to assess the parameters of the current working environment and the functioning of various Giant Eagle grievance procedures, again as created. by the CBA. As the second *DeCoe* criterion is satisfied, preemption is clearly warranted.

(May 23, 2005, Memorandum and Order at unnumbered page 5).

Second, Craig asserts various wrongs alleged to have caused his demotion and discharge. As pointed out by the district court, "[Craig's] termination resulted from a grievance process established by a CBA, signed only by the parties engaged in collective bargaining, and ended his tenure at a job whose terms and conditions were created by and subject to a CBA." (May 23, 2005, Memorandum and Order at unnumbered pages 5-6). Accordingly, removal was proper and remand was not warranted.

This court reviews de novo a district court's grant of summary judgment. *See Harrow Prods., Inc.* v. *Liberty Mut. Ins. Co.*, 64 F.3d 1015 (6th Cir. 1995). Summary judgment is proper if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In this case, the parties do not allege there are any issues of material fact; therefore, the court must consider whether the defendant is entitled to judgment as a matter of law.

Upon review, we conclude that the district court properly upheld the arbitrator's decision. "[C]ourts must accord an arbitrator's decision substantial deference because it is the arbitrator's construction of the agreement, not the court's construction, to which the parties have agreed." *Solvay Pharms., Inc.* v. *Duramed Pharms., Inc.*, 442 F.3d 471,476 (6th Cir. 2006) (citation and internal quotation marks omitted); *see also Michigan Family Resources, Inc.* v. *Servo Employees Int'l Union, Local 517M*, 475 F.3d 746,755 (6th Cir. 2007) (en banc) (referring to "the exceedingly deferential task of considering whether to vacate an arbitration award"), *pet. cert. filed*, 75 U. S.L. W. 3598 (U.S. Apr. 26, 2007) (No. 06'-1435). "'[C]ourts must refrain from reversing an arbitrator simply because the court disagrees with the result or believes the arbitrator made a serious legal or factual error.'" *Solvay*, 442 F.3d at 476 (quoting *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 38 (1987)); *see also Michigan Family Resources*, 475 F.3d at 748 (en banc) ("[B]ecause the company has shown no more

than that the arbitrator made an error, perhaps even a 'serious error,' in interpreting the contract, we ... direct the district court to enter an order enforcing the award.") (citing *Misco,* 484 U.S. at 38-39).

If the arbitrator's award "draws its essence from the ... agreement," and is not merely the arbitrator's "own brand of industrial justice," the award is legitimate. *Solvay,* 442 F.3d at 476 (quoting *United Steelworkers of Am.* v. *Enter. Wheel & Car. Co.,* 363 U.S. 593, 597 (1960)). As this court recently explained, the Supreme Court's decisions in *Misco,* 484 U.S. 29 (1987) and *Major League Baseball Players Ass 'n* V. *Garvey,* 532 U.S. 504 (2001)

> define the line between a permissible award (that "draws its essence from the contract") and an impermissible award (that "simply reflects the arbitrator's own notion[] of industrial justice) based on whether the arbitrator "is even arguably construing or applying the contract and acting within the scope of his authority."

> *Misco,* 484 U.S. at 38 ... ; *see Garvey,* 532 U.S. at 509 .... * * * In both cases, the [Supreme] Court held that once it was established that the arbitrator was construing or applying the contract (and acting within the scope of his authority), it made no difference whether the

> arbitrator had committed "serious," "improvident," or even "silly" errors in resolving the merits of the dispute. *Misco,* 484 U.S. at 38-39 ... ; *Garvey,* 532 U.S. at 509-10 ....

Michigan Family Resources, 475 F.3d at 752-53 *(en banc).*

Craig does not challenge the validity of the arbitration process on appeal. Nevertheless, we have examined the arbitrator's decision and, in light of the deference we must give to such decisions, conclude that the decision is drawn from the essence of the CBA. The arbitrator was charged with deciding whether Giant Eagle had just cause to discharge Craig. To do so, she had to evaluate Craig's particular conduct and determine whether that conduct fell within the CBA's discharge provision. The arbitrator duly executed her authority under the CBA and did not dispense her own brand of industrial justice so as to overcome the deferential standard of review afforded arbitration awards. *Id.*

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s

Leonard Green, Clerk

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Matthew A. Craig 11325 Cheyenne Trail Suite 302 Parma Heights, OH 44130, Plaintiff v. John M. Brigadier 6002 Bradley Avenue Parma, OH 44129 Sue M. Brigadier 6002 Bradley Avenue Parma, OH 44129 David L. Brigadier 6002 Bradley Avenue Parma, OH 44129 1533 Spring Garden Avenue Lakewood, OH 44107 Riser Foods Company d/b/a Giant Eagle, Inc. 5300 Richmond Road	)	No.: CV04536338 JUDGE: Jose' A. Villanueva **FIRST AMENDED COMPLAINT WITH JURY DEMAND ENDORSED HEREON**

Bedford Heights, OH)
44146)
John Doe)
**Address To Be)
Provided By)
Amendment)
Once True Name Is)
Known**),)

Defendants.

STATEMENT OF JURISDICTION

1. Plaintiff Matthew A. Craig, at all times stated herein, has been and continues to be a resident of Cuyahoga County, Ohio.
2. Defendant John M. Brigadier, at all times stated herein, has been and continuesto be a resident of and employed in Cuyahoga County, Ohio.
3. Defendant Sue M. Brigadier, at all times stated herein, has been and continues to be a resident of Cuyahoga County, Ohio.
4. Defendant David L. Brigadier, at all times stated herein, has been and continues to be a resident of Cuyahoga County, Ohio.
5. Defendant Jacquelyn F. Lenson (hereinafter "Lenson"), at all times stated herein, has been and continues to be a resident of and employed in Cuyahoga County, Ohio.
6. Defendant Riser Foods Company, doing

business as Giant Eagle, Inc. (hereinafter "GE"), is a for-profit corporation registered to conduct business in the state of Ohio and operates multiple retail stores throughout Cuyahoga County, Ohio.

7. Defendant *John Doe*, at all times stated herein, has been and continues to be a resident of and employed in Cuyahoga County, Ohio.

8. The causes of action, damages sustained, and the events that occurred, originate in Cuyahoga County, Ohio. This is a civil action for damages in excess of $25,000.

9. None of the causes of action being alleged hereunder are covered by or subject to the collective bargaining agreement by and between Defendant GE and United Food & Commercial Workers Union Local No. 880, to which Plaintiff is a party.

FACTS COMMON TO ALL COUNTS

10. Plaintiff was hired by Defendant GE as a Part-Time Grocery Clerk for its retail store #0185, located at 6925 Southland Drive, Middleburg Heights, Ohio (hereinafter "0185"), and began work on July 27, 2003.

11. Plaintiff was regularly employed by Defendant GE at 0185 until his discharge on July 1, 2004.

12. Up until the time of his demotion on June 25, 2004, and subsequent discharge on July 1, 2004, Plaintiff had never been subjected to disciplinary action by Defendant GE.

13. During the term of his employ, Plaintiff received several awards and pay increases for service

to Defendant GE beyond that which was required.

14. During the latter part of March, 2004, Plaintiff was promoted to the "Manager in Charge" position and regularly served as closing manager for 0185 until his demotion on June 25, 2004.

15. Plaintiff received a pay increase soon after and corresponding to being promoted to the "Manager in Charge" position.

16. Plaintiff is currently appealing his discharge and other contractual violations which are subject to the collective bargaining agreement by and between Defendant GE and United Food & Commercial Workers Union Local No. 880 pursuant to an alternative dispute resolution process set forth in the agreement.

COUNT 1

(Slander - John Brigadier)

17. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 16 as if fully rewritten herein.

18. Sometime after Plaintiff was hired by Defendant GE, Defendant John Brigadier was hired by Defendant GE to work at 0185.

19. Upon Plaintiff's promotion to "Manager in Charge", Defendant John Brigadier began working under the direct supervision of Plaintiff on the days of the week when both Plaintiff and Defendant John Brigadier worked during the evening hours.

20. Plaintiff's authority over Defendant John Brigadier and the other employees of 0185 was limited to directing their work activities while

Plaintiff was actively serving as "Manager in Charge". The extent of Plaintiff's authority to discipline employees was to send them home for the remainder of their shift for insubordination. At no time was Plaintiff given the authority to discharge, change pay rates, or otherwise alter conditions of employment for any of the employees at 0185.

21. Sometime before June 25, 2004, without any provocation or notice to Plaintiff, Defendant John Brigadier falsely and maliciously alleged to others that Plaintiff had committed sexual harassment against him, imputing moral turpitude and the commission of a criminal offense in violation of federal and state laws, including 42 U.S.C.A. § 2000e-2(m) (West 2003) and section 4112.02 of the Ohio Revised Code Annotated (West 2004), by Plaintiff.

22. The false and unprovoked allegations made by Defendant John Brigadier, which were calculated to injure Plaintiff's contractual relationship with Defendant GE, have subjected Plaintiff to ridicule and have caused Plaintiff to suffer personal humiliation, mental anguish, and degradation of his reputation.

23. As a direct and proximate result of the slanderous accusations made against Plaintiff by Defendant John Brigadier, Plaintiff has suffered and will continue to suffer personal, professional, and financial injury.

COUNT 2

(Libel - Sue Brigadier and David Brigadier)

24. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 23 as if fully rewritten herein.

25. Among those to whom John Brigadier published his defamatory remarks were his parents, Defendants Sue Brigadier and David Brigadier.

26. Thereafter, without just cause or occasion, Defendants Sue Brigadier and David Brigadier jointly and severally perpetuated the slanderous sexual harassment allegations made against Plaintiff by Defendant John Brigadier by maliciously publicizing the false allegations to others in written form. Among those to whom Defendants Sue Brigadier and David Brigadier published said allegations were other employees of Defendant GE, whereby Defendants Sue Brigadier and David Brigadier also indicated their propensity to take legal action against Defendant GE based on the allegations.

27. At no previous time has Defendant Sue Brigadier discussed any matter with Plaintiff other than to notify Plaintiff on a few occasions via telephone that Defendant John Brigadier would not be reporting to work as scheduled.

28. At no previous time has Defendant David Brigadier communicated with Plaintiff in any form.

29. The false allegations made by Defendants Sue Brigadier and David Brigadier, which have been made in bad faith and which were calculated to injure Plaintiff's contractual relationship with

Defendant GE, have subjected Plaintiff to ridicule and have caused Plaintiff to suffer personal humiliation, mental anguish, and degradation of his reputation.

30. As a direct and proximate result of the libelous accusations jointly and severally made against Plaintiff by Defendants Sue Brigadier and David Brigadier, Plaintiff has suffered and will continue to suffer personal, professional, and financial injury.

COUNT 3

(Slander - Sue Brigadier and David Brigadier)

31. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 30 as if fully rewritten herein.

32. Without just cause or occasion, Defendants Sue Brigadier and David Brigadier jointly and severally perpetuated the false sexual harassment allegations made against Plaintiff by Defendant John Brigadier by maliciously continuing to publicize the false allegations to others through verbal communications.

33. The false allegations made by Defendants Sue Brigadier and David Brigadier, which have been made in bad faith and which were calculated to injure Plaintiff's contractual relationship with Defendant GE, have subjected Plaintiff to ridicule and have caused Plaintiff to sffer personal humiliation, mental anguish, and degradation of his reputation.

34. As a direct and proximate result of the

slanderous accusations made against Plaintiff by Defendants Sue Brigadier and David Brigadier, Plaintiff has suffered and will continue to suffer personal, professional, and financial injury.

COUNT 4

(Libel - Lenson)

35. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 34 as if fully rewritten herein.

36. Of those to whom the defamatory sexual harassment allegations made against Plaintiff by Defendants John Brigadier, Sue Brigadier, and David Brigadier were communicated, either directly or indirectly, is Defendant Lenson.

37. Defendant Lenson is employed by Defendant GE and at all times relevant herein has served as Human Resources Manager for 0185.

38. Upon learning of the unsubstantiated allegations made against Plaintiff by Defendants John Brigadier, Sue Brigadier, and David Brigadier, Defendant Lenson, while acting within the scope of her employment, perpetuated the defamatory allegations against Plaintiff by publicizing the false allegations to others in written form.

39. Defendant Lenson maliciously perpetuated the allegations made against Plaintiff by Defendants John Brigadier, Sue Brigadier, and David Brigadier, even though she knew or should have known that the sexual harassment allegations were without merit.

40. The false allegations made and perpetuated by

Defendant Lenson, which she has caused to be widely distributed and which were calculated by Defendant Lenson to injure Plaintiff's contractual relationship with Defendant GE, have subjected Plaintiff to ridicule and have caused Plaintiff to suffer personal humiliation, mental anguish, and degradation of his reputation.

41. As a direct and proximate result of the libelous accusations made against Plaintiff by Defendant Lenson, Plaintiff has suffered and will continue to suffer personal, professional, and financial injury.

COUNT 5

(Slander - Lenson)

42. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 41 as if fully rewritten herein.

43. Upon learning of the unsubstantiated allegations made against Plaintiff by Defendants John Brigadier, Sue Brigadier, and David Brigadier, Defendant Lenson, while acting within the scope of her employment, perpetuated the defamatory allegations against Plaintiff by publicizing the false allegations to others through verbal communications. Publication by Defendant Lenson included directly accusing Plaintiff of the crime of sexual harassment in the presence of others.

44. Defendant Lenson maliciously perpetuated the allegations made against Plaintiff by Defendants John Brigadier, Sue Brigadier, and David Brigadier, even though she knew or should have known that the

sexual harassment allegations were without merit.

45. The false allegations made and perpetuated by Defendant Lenson, which she has caused to be widely distributed and which were calculated by Defendant Lenson to injure Plaintiff's contractual relationship with Defendant GE, have subjected Plaintiff to ridicule and have caused Plaintiff to suffer personal humiliation, mental anguish, and degradation of his reputation.

46. As a direct and proximate result of the slanderous accusations made against Plaintiff by Defendant Lenson, Plaintiff has suffered and will continue to suffer personal, professional, and financial injury.

COUNT 6

(Slander - Lenson)

47. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 46 as if fully rewritten herein.

48. At or about the same time as making and perpetuating the allegations set forth in Counts 4 and 5, Defendant Lenson falsely and maliciously accused Plaintiff, in the presence of others, of having committed criminal voyeurism, an act imputing moral turpitude and the commission of a criminal offense in violation of section 2907.08 of the Ohio Revised Code Annotated (West 2003) by Plaintiff.

49. The allegations of criminal voyeurism made by Defendant Lenson, which were calculated to injure Plaintiff's contractual relationship with Defendant

GE, have since been widely publicized and have subjected Plaintiff to ridicule and have caused Plaintiff to suffer personal humiliation, mental anguish, and degradation of his reputation.

50. As a direct and proximate result of the slanderous accusations of criminal voyeurism made against Plaintiff by Defendant Lenson, Plaintiff has suffered and will continue to suffer personal, professional, and financial injury.

COUNT 7

(Defamation - GE)

51. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 50 as if fully rewritten herein.

52. The libelous and slanderous allegations made by Defendant Lenson, at all times herein stated, were condoned and ratified by Defendant GE both implicitly and expressly through the supportive actions taken by other managerial employees of Defendant GE.

53. The aforesaid allegations made by Defendant Lenson, who serves in a managerial capacity, were calculated to facilitate the business interests of her employer, Defendant GE, by reducing the risk of a lawsuit being brought against Defendant GE by Defendants Sue Brigadier and David Brigadier.

54. As a direct and proximate result of the false accusations of moral and criminal misconduct made and perpetuated by Defendant Lenson as set forth in Counts 4 through 6, for which Defendant GE has

directly benefited, Plaintiff has suffered and will continue to suffer personal, professional, and financial injury for which Defendant GE is jointly and severally responsible therefore.

COUNT 8

(Libel - *John Doe*)

55. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 54 as if fully rewritten herein.

56. Sometime before June 25, 2004, without any provocation or notice to Plaintiff, Defendant *John Doe*, an employee of Defendant GE whose true name was not discoverable as of the time of pleading, falsely and maliciously alleged to others in writing that Plaintiff had ordered an employee under eighteen years of age to operate hazardous machinery in violation of federal and state laws including 29 C.F.R. § 570.63 (2004), section 4109.05 of the Ohio Revised Code Annotated (West 2004), and section 4101:9-2-10 of the Ohio Administrative Code (2004).

57. The allegations of criminal misconduct made by Defendant *John Doe* against Plaintiff, which were calculated to injure Plaintiff's contractual relationship with Defendant GE, have subjected Plaintiff to ridicule and have caused Plaintiff to suffer personal humiliation, mental anguish, and degradation of his reputation.

58. As a direct and proximate result of the libelous accusations made against Plaintiff by Defendant *John Doe*, Plaintiff has suffered and will continue to

suffer personal, professional, and financial injury.

COUNT 9

(Slander - *John Doe*)

59. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 58 as if fully rewritten herein.

60. Sometime before June 25, 2004, without any provocation or notice to Plaintiff, Defendant *John Doe* falsely and maliciously alleged to others through verbal communications that Plaintiff had ordered an employee under eighteen years of age to operate hazardous machinery in violation of federal and state laws including 29 C.F.R. § 570.63 (2004), section 4109.05 of the Ohio Revised Code Annotated (West 2004), and section 4101:9-2-10 of the Ohio Administrative Code (2004).

61. The allegations of criminal misconduct made by Defendant *John Doe* against Plaintiff, which were calculated to injure Plaintiff's contractual relationship with Defendant GE, have subjected Plaintiff to ridicule and have caused Plaintiff to suffer personal humiliation, mental anguish, and degradation of his reputation.

62. As a direct and proximate result of the slanderous accusations made against Plaintiff by Defendant *John Doe*, Plaintiff has suffered and will continue to suffer personal, professional, and financial injury.

COUNT 10

(Tortious Interference with Employment/Contractual Relationship - John Brigadier)

63. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 62 as if fully rewritten herein.

64. The false allegations of sexual harassment maliciously made against Plaintiff by Defendant John Brigadier were not within the scope of his duties as an employee of Defendant GE and were made solely within his individual capacity and for his personal benefit by attempting to secure a more lax working environment under the supervision of a more lenient supervisor.

65. As a direct and proximate result of Defendant John Brigadier's tortious interference with the employment/contractual relationship between Plaintiff and Defendant GE, for which Plaintiff's demotion and subsequent discharge by Defendant GE is directly attributed, Plaintiff has suffered and will continue to suffer personal, professional, and financial injury.

COUNT 11

(Tortious Interference - Sue Brigadier and David Brigadier)

66. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 65 as if fully rewritten herein.

67. The libelous and slanderous allegations of sexual harassment jointly and severally made

against Plaintiff by Defendants Sue Brigadier and David Brigadier were made with malicious intent and were made for their joint and several benefit by attempting to vicariously obtain damages from Defendant GE and by attempting to obtain a more lax working environment for their son, Defendant John Brigadier.

68. At all times herein stated, neither Defendant Sue Brigadier nor Defendant David Brigadier had any form of employment, business, or contractual relationship with either Plaintiff or Defendant GE.

69. As a direct and proximate reslt of the tortious interference with the employment/contractual relationship between Plaintiff and Defendant GE by Defendants Sue Brigadier and David Brigadier, for which Plaintiff's demotion and subsequent discharge by Defendant GE is directly attributed, Plaintiff has suffered and will continue to suffer personal, professional, and financial injury.

COUNT 12

(Tortious Interference with Employment/Contractual Relationship - *John Doe*)

70. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 69 as if fully rewritten herein.

71. As a non-supervisory employee of Defendant GE, the allegations made by Defendant *John Doe* that Plaintiff had ordered an employee under eighteen years of age to operate hazardous machinery in violation of federal and state laws, including 29

C.F.R. § 570.63 (2004), section 4109.05 of the Ohio Revised Code Annotated (West 2004), and section 4101:9-2-10 of the Ohio Administrative Code (2004), were not within the scope of his duties and were made solely within his individual capacity.

72. Defendant *John Doe* made the aforesaid allegations against Plaintiff with knowledge that they were false and with the justifiable expectation and desire that others, including Defendant Lenson, would accept them as true.

73. The allegations made to others against Plaintiff by Defendant *John Doe* were made with an underlying malicious intent and were made for his personal benefit by attempting to secure a more lax working environment under the supervision of a more lenient supervisor.

74. As a direct and proximate result of Defendant *John Doe's* fraud upon others, which has tortiously interfered with the employment/contractual relationship between Plaintiff and Defendant GE and has caused Plaintiff's demotion and subsequent discharge by Defendant GE, Plaintiff has suffered and will continue to suffer personal, professional, and financial injury.

COUNT 13

(Civil Conspiracy to Defame)

75. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 74 as if fully rewritten herein.

76. The defamatory allegations made by

Defendants John Brigadier, Sue Brigadier, David Brigadier, Lenson, GE by and through its employees, *John Doe*, and other employees of Defendant GE not yet named as defendants, were made with malicious intent and in concert among the Defendants for the purpose of injuring Plaintiff in his person.

77. The concerted actions undertaken by Defendants as set forth in paragraph 76, above, have caused injury to Plaintiff in the form of ridicule and degradation of his reputation which has, in turn, resulted in his demotion, loss of his employment, and impairment of his future earning capacity.

COUNT 14

(Civil Conspiracy to Tortiously Interfere with Employment/Contractual Relationship)

78. Plaintiff repeats and incorporates by reference all material allegations set forth in paragraphs 1 through 77 as if fully rewritten herein.

79. The actions undertaken by Defendants John Brigadier, Sue Brigadier, David Brigadier, Lenson, *John Doe*, and other employees of Defendant GE not yet named as defendants, to tortiously interfere with the employment/contractual relationship between Plaintiff and Defendant GE were done so in concert among the Defendants and were carried out with malicious intent to injure Plaintiff.

80. The concerted actions undertaken by Defendants as set forth in paragraph 79, above, have caused personal, professional, and financial injury to

Plaintiff including his demotion and subsequent discharge by Defendant GE.

WHEREFORE, Plaintiff demands judgment jointly and severally against all Defendants as follows:

a. Court order enjoining Defendants from continued publication of the defamatory allegations made against Plaintiff as set forth above.

b. Compensatory and punitive damages in excess of $25,000.

c. Cost of suit.

d. Such other relief as the court deems just.

Respectfully submitted,

Dated: August 5, 2004

/s

Matthew A. Craig
11325 Cheyenne Trail
Suite 302
Parma Heights, OH 44130
440-888-2280

Private Party Civil Cases Denied Oral Argument Pursuant to Sixth Circuit Rule 34(j) (April 1, 2005 - March 31, 2006)

* = cases *not* involving a pro se party.

04-1048	04-5946	05-3474
04-1460	04-5964	05-3504
04-1498	*04-6120	05-3550
04-1609	04-6212	05-3553
04-1617	04-6231	05-3612
04-1698	04-6256	05-3807
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04-1795	04-6423	05-3878
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04-2265	05-1370	05-5083
04-2290	05-1406	05-5099
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04-2352	05-1614	05-5441
04-2399	05-1648	05-5443
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04-3162	05-1794	05-5519
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04-4279	05-3220
04-4302	05-3222
04-4360	05-3225
04-4412	05-3415
04-5889	05-3463

Supreme Court, U.S.
FILED
07-534 OCT 9 - 2007
OFFICE OF THE CLERK

No. 2

In The

SUPREME COURT OF THE UNITED STATES

MATTHEW A. CRAIG,

Petitioner

v.

JOHN BRIGADIER, SUSAN M. BRIGADIER, DAVID L. BRIGADIER, JACQUELYN F. LENSON, RISER FOODS COMPANY, d/b/a GIANT EAGLE, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MATTHEW A. CRAIG,	)	
Plaintiff	)	Case No. 1:04CV1741
vs.	)	JUDGE ANN ALDRICH
JOHN BRIGADIER, et al.,	)	ORDER
Defendants.	)	

The Court, concluding that no genuine issues of material fact remain on the plaintiff's claims, has filed its memorandum and order granting summary judgment to defendants. Therefore,

IT IS ORDERED that the motions for summary judgment (Docket No. 25) is granted, final judgment is entered in favor of all defendants, and the case is dismissed.

This judgment is final and appealable.

s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: March 30, 2006

United States District Court,
N.D. Ohio, Eastern Division.

Matthew A. CRAIG, Plaintiff,
v.
John BRIGADIER, et al., Defendants.

No. 1:04CV1741.

March 30, 2006.

Matthew A. Craig, Vermilion, OH, pro se.

Mark V. Webber, Robert M. Wolff, Duvin, Cahn & Hutton, Cleveland, OH, for Defendants.

MEMORANDUM AND ORDER

ALDRICH, J.

In this action, originally filed in the Cuyahoga County Court of Common Pleas, Matthew Craig ("Craig") challenges the resolution of a dispute with his former employer, Riser Foods Company, d/b/a Giant Eagle, Inc. ("Giant Eagle"). On August 26, 2004, defendants alleged federal jurisdiction over Craig's claims under the Labor Management Relations Act (LMRA), 29 U.S.C. § 158(a), and removed the case to this court (Docket No. 1). On May 23, 2005, the court denied Craig's motion to remand the case (Docket No. 20), finding that Craig's

claims of defamation, libel, slander, conspiracy, and tortious interference with contract are properly read as claims for improper discipline and discharge under the CBA, and thus completely pre-empted under § 301 of the LMRA. Now before the court is a motion for summary judgment under Federal Rule of Civil Procedure 56(c), filed by Giant Eagle (Docket No. 25). For the following reasons, the court grants this motion, and enters judgment in favor of all defendants.

I. Background

On July 27, 2003, Craig began work as a part-time grocery clerk at the Giant Eagle on Southland Drive in Middleburg Heights. As is required of all such Giant Eagle employees, Craig became a member [*2] of United Food & Commercial Workers Union Local No. 880 ("UFCW"). Craig's employment was thus subject to the provisions of the current collective bargaining agreement ("CBA") governing the relationship between Giant Eagle and its UFCW member employees.

By the spring of 2004, Craig was given the title of "Manager in Charge," which carried with it some slight authority over other employees. (Craig has summarized the extent of his authority as the ability "to send [others] home for the remainder of their shift [sic] for insubordination.") John Brigadier was among the employees assigned to work shifts during which Craig served as "Manager in Charge."

On June 24, 2004, Brigadier lodged a complaint of sexual harassment against Craig. Giant

Eagle authorities considered this complaint, along with several similar claims against Craig made by other employees, and on June 25, 2004, the company removed Craig's "Manager in Charge" title, without reduction in pay. On June 30, 2004, a meeting was held between Craig, Human Resources Manager Jacquelyn Lenson, and Manager of Employee Relations Larane Hulsman. The meeting did not proceed amicably (Craig reportedly walked out midway through), and Craig's employment was terminated shortly thereafter, for insubordination.

On July 13, 2004, Craig filed a formal grievance against Giant Eagle, alleging that he was wrongfully discharged for seeking redress against those making defamatory statements about him, and challenging various aspects of the company's process for handling sexual harassment claims. Craig demanded reinstatement and an award of lost wages. On July 27, 2004, Craig met with UFCW representatives and store management personnel for a grievance hearing. Following this meeting, Giant Eagle denied Craig's grievance, finding that he was terminated for just cause. Giant Eagle claims that the parties also "met again subsequently, and the Company again denied the grievance." Defendants' **[*3]** Motion at 5.

On July 20, 2004, Craig filed a complaint in the Cuyahoga County Court of Common Pleas. (He amended the complaint on August 5, 2004). Craig named Giant Eagle as a defendant, as well as Giant Eagle employees John Brigadier and Jacquelyn Lenson, Brigadier's parents David and Sue, and an

unnamed "John Doe" party (also employed by Giant Eagle). Craig's complaint includes 14 counts of slander, libel, defamation, tortious interference with employment and contractual relationships, and civil conspiracy allegedly committed by these parties, and/or various combinations thereof. As noted, Giant Eagle removed the case to this court on August 26, 2004, and the court upheld removal as proper.

On March 25, 2005, an arbitration hearing was held on Craig's appeal of the adverse decision(s) at the grievance stage. On June 22, 2005, arbitrator Patricia Thomas Bittel issued her post-hearing decision on the matter. The arbitrator ruled entirely in favor of Giant Eagle, finding that Craig was properly terminated for insubordination under the terms of the CBA, that Craig would not benefit from progressive discipline, and that Craig's version of events was not credible.

II. Discussion

Under Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 451 (6th Cir.2004).

If the movant succeeds, the burden then shifts to the nonmoving party to demonstrate the existence of a material dispute as provided in Rule 56(e): **[*4]**

> [a]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed.R.Civ.P. 56(e); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Parties opposing summary judgment must go beyond the pleadings and produce some type of evidentiary material in support of their position. *See Celotex*, 477 U.S. at 324.

In determining whether a genuine issue of material fact exists, this Court must view the evidence in a light most favorable to the nonmoving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Hamby v. Neel*, 368 F.3d 549, 556 (6th Cir.2004); *Williams v. Int'l Paper Co.*, 227 F.3d 706, 710 (6th Cir.2000). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson*, 477 U.S. at 248. Determination of whether an issue is "genuine" requires consideration of the applicable evidentiary

standards. Thus, in most civil cases, the Court must decide whether the evidence is such that "reasonable jurors could find by a preponderance of the evidence that the [nonmoving party] is entitled to a verdict" or whether the evidence is "so one-sided that [the moving party] must prevail as a matter of law." *Id.* at 252. Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322.

Giant Eagle claims that no genuine issue of material fact remains on Craig's claims, owing to their preemption by the LMRA, and the final and binding decision of the arbitrator that Craig was terminated for just cause. In its May 23 order, the court agreed that "Craig's claims are all functionally equivalent to a claim for breach of the collective bargaining agreement, and therefore pre-empted by the **[*5]** LMRA[.]" Docket No.20, at 3-4. "[R]esolution of Craig's claims of defamation, libel, slander, conspiracy, and tortious interference with contract and employment would require this Court to analyze and interpret the provisions of the applicable CBA ... these claims are therefore pre-empted under LMRA." *Id.* at 4.

Since the court issued its opinion on federal jurisdiction last May, the arbitrator has issued an opinion which obviates the need for any further analysis or interpretation. Besides allowing the case

to proceed in federal court, complete LMRA preemption requires that the court enforce arbitration as Craig's exclusive venue for challenging his termination. As a member of UFCW, Craig is deemed to have bargained for a CBA provision allowing union representation in the grievance process, relinquishing in turn the right to challenge said process in federal court. As the Supreme Court has consistently held,

> [w]hen the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not draw its essence from the collective bargaining agreement, a court is bound to enforce the award and is not entitled to review the merits of the contract dispute.

W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, 461 U.S. 757, 764, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983)(quoting *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). "Subject to very limited judicial review, the employee will be bound by the result according to the finality provisions of the agreement." *Sparks v. International Union, United States Auto., Aerospace & Agricultural Implement Workers,* 980 F.2d 394, 398 (6th

Cir.1992)(citing *DelCostello v. Teamsters,* 462 U.S. 151, 164, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983)).

In challenging the arbitral decision at issue here, Craig makes no allegation that could be read as an appeal to the "essence of the collective bargaining agreement." Nor does he endeavor to prove that the Union's conduct in representing him was sufficiently poor as to constitute a breach of duty of fair [*6] representation-an "indispensable predicate," *id.,* to bringing the type of action a court may hear "notwithstanding the outcome or finality of the grievance or arbitration proceeding." *DelCostello,* 462 U.S. at 164.

Instead, Craig limits his opposition to repeating his arguments that remand is proper, and agitating for a reversal of the applicable Sixth Circuit precedent. Craig may well believe that "Several [of the Circuit's] conclusions of law" have been "in error," Plaintiff's Memorandum in Opposition at 7, but this court is bound by those conclusions nonetheless. The court also stands by its determination that the facts of Craig's case bear more than a passing resemblance to those in *DeCoe v. General Motors Corp.,* 32 F.3d 212 (6 Cir.1994) and *Jones v. General Motors,* 939 F.2d 380 (6th Cir.1991), cases in which the discharged plaintiffs raised claims such as defamation, tortious interference, and intentional infliction of emotional distress. The Sixth Circuit upheld the finding of preemption in those cases; the provisions of the LMRA must likewise govern the resolution of Craig's claims.

Because Giant Eagle has successfully demonstrated that the arbitrator ruled in its favor, that the decision of the arbitrator was final, and that the provisions of both the LMRA and the relevant CBA require this court to enforce that decision against Craig, the company has carried its burden to show the absence of genuine issues of material fact concerning Craig's pre-empted claims. By re-asserting his previous unsuccessful arguments, and failing to challenge the validity of the arbitration process in any respect, Craig has not carried his corresponding burden in response. Summary judgment is therefore appropriate on all of Craig's claims. [*7]

III. Conclusion

For the foregoing reasons, the court grants the motion for summary judgment, and enters judgment in favor of all defendants. The outstanding motion for a protective order, seeking a delay of the discovery process pending a ruling on the dispositive motion (Docket No. 27) is therefore denied as moot. The court further denies the defendants' motion for Rule 11 sanctions (Docket No. 34, alleging that Craig has frivolously joined uninvolved parties).

This order is final and appealable.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MATTHEW A. CRAIG, Plaintiff	) Case No. 1:04CV1741
vs.	) JUDGE ANN ALDRICH
JOHN BRIGADIER, ET AL., Defendants.	) MEMORANDUM AND ORDER

In this action, originally filed in the Cuyahoga County Court of Common Pleas, Matthew Craig ("Craig") seeks resolution of a dispute with his former employer, Riser Foods Company, d/b/a Giant Eagle, Inc. ("Giant Eagle"). On August 26, 2004, defendants alleged federal jurisdiction over Craig's claims under the Labor Management Relations Act (LMRA), 29 U.S.C. § 158(a), and removed the case to this court (Docket No.1). Now before the court is a motion to remand for lack of subject matter jurisdiction filed by Craig (Docket No.7). For the following reasons, the court finds that removal was proper, and denies this motion.

I. Background

On July 20, 2004, Craig filed a complaint in the Cuyahoga County Court of Common Pleas. The complaint names Giant Eagle as a defendant, as well

as Giant Eagle employees John Brigadier and Jacquelyn Lenson, Brigadier's parents David and Sue[1], and an unnamed "John Doe" party (also employed **[*2]** by Giant Eagle). Craig's complaint includes 14 counts of slander, libel, defamation, tortious interference with employment and contractual relationships, and civil conspiracy allegedly committed by these parties, and/or various combinations thereof.

Craig began work as a part-time grocery clerk at the Giant Eagle on Southland Drive in Middleburg Heights on July 27, 2003. As is required of all such Giant Eagle employees, Craig became a member of United Food & Commercial Workers Union Local No. 880 ("UFCW"). At some point in his tenure at the store - Craig claims in late March of2004 - Craig was given the title of "Manager in Charge," which carried with it some slight authority over other employees. (Craig summarizes the extent of his authority as the ability "to send [others] home for the remainder of their shift [sic] for insubordination.") John Brigadier was apparently among the employees assigned to work shifts during which Craig served as "Manager in Charge."

Some time in June of 2004, Brigadier lodged a complaint of sexual harassment against Craig. Giant Eagle authorities considered this complaint, along

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[1] Craig amended his complaint on August 5, 2004, to include the correct names of Brigadier's parents. As originally filed, the document improperly named "Denise and Bruce Brigadier."

with several similar claims against Craig made by other employees, and on June 25, 2004, the company removed Craig's "Manager in Charge" title, without reduction in pay. On June 30, 2004, a meeting was held between Craig, Human Resources Manager Jacquelyn Lenson, and Manager of Employee Relations Larane Hulsman. The meeting did not proceed amicably, and Craig's employment was terminated shortly thereafter. (Giant Eagle claims a termination date of June 30, for insubordination; Craig claims July 1, for the variety of allegedly illegitimate reasons outlined in his complaint.)

On July 13, 2004, Craig filed a formal grievance against Giant Eagle, alleging that he was **[*3]** wrongfully discharged for seeking redress against those making defamatory statements about him, and challenging various aspects of the company's process for handling sexual harassment claims. Craig demanded reinstatement and lost wages. On July 27, 2004, Craig met with UFCW representatives and store management personnel for a grievance hearing. Following this meeting, Giant Eagle denied Craig's grievance and his request for reinstatement and lost wages. Giant Eagle reports that UFCW has declined to pursue the matter further; Craig alleges that he "is currently appealing ... pursuant to an alternative dispute resolution process set forth in the agreement."

By "agreement," Craig refers to the current incarnation of the Collective Bargaining Agreement ("CBA") governing the relationship between Giant Eagle and its UFCW member employees. The CBA

governed the terms and conditions of Craig's employment at all stages, and it set forth the procedures followed by Craig in challenging his demotion and termination.

In removing the case to this court, Giant Eagle asserts that Craig's claims of defamation, libel, slander, conspiracy, and tortious interference with contract are in fact properly read as claims for improper discipline and discharge under the CBA. Such claims would be completely pre-empted under § 301 of the LMRA. Craig counters that interpretation of the CBA is in no way necessary to resolve his claims, which, he alleges, sound completely in state law.

II. Discussion

Federal law permits a defendant in a state civil action to remove it to a federal district court if such action "might have been brought there originally." *Oklahoma Tax Commission* v. *Graham,* 489 U.S. 838, 840 (1989). The original jurisdiction of the district court can be "founded on a claim or right arising under the Constitution, treaties or laws of the United States" without regard to the citizenship or residence of the parties. *See* 28 U.S.C. §1441(b). As the removing party, Giant Eagle bears the burden of **[*4]** establishing the existence of original jurisdiction in this Court. *Ahearn* v. *Charter Towns hip of Bloomfield,* 100 F.3d 451, 453-54 (6th Cir. 1996).

The crux of Giant Eagle's argument for removal is its contention that Craig's claims are all

functionally equivalent to a claim for breach of the collective bargaining agreement, and therefore pre-empted by the LMRA, which states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a)(2004). "[T]he Supreme Court has held that section 301 preempts state law rules that substantially implicate the meaning of collective bargaining agreement terms." *DeCoe* v. *GMC,* 32 F.3d 212,216 (6th Cir. 1994), citing *Allis-Chalmers Corp.* v. *Lueck,* 471 U.S. 202, 210 (1985).

Giant Eagle argues that resolution of Craig's claims of defamation, libel, slander, conspiracy, and tortious interference with contract and employment would require this Court to analyze and interpret the provisions of the applicable CBA, and that these claims are therefore pre-empted under LMRA.

In DeCoe, the Sixth Circuit explained its "two-step approach for determining whether section 301 preemption applies."

> First, the district court must examine whether proof of the state law claim requires interpretation of collective

> bargaining agreement terms. Second, the court must ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law. If the right both is borne of state law and does not invoke contract interpretation, then there is no preemption. However, if neither or only one criterion is satisfied, section 301 preemption is warranted.

Id. at 216 (citations omitted).

Upon review of the facts underlying Craig's claims, it is clear that preemption is warranted and that removal was thus proper. As in *DeCoe,* Craig may hope to satisfy the first requirement, in that no direct **[*5]** interpretation of specific CBA provisions should be necessary to resolve his claims. However, as in *DeCoe,* resolution of Craig's suit will "require [the] court to address relationships that have been created through the collective bargaining process and to mediate a dispute founded upon rights created by a CBA." *Id.* at 218, quoting *Jones* v. *General Motors,* 939 F.2d 380, 382-83 (6th Cir. 1991).

Craig complains of defamation, slander, and libel- torts which allegedly caused him harm in that they resulted in his demotion and termination. Examining the existence and (potentially) the severity of this harm will evidently require the court to evaluate the parameters for proper and improper discharge. Craig claims tortious interference with his employment and with his contractual

relationship with Giant Eagle (as well as conspiracy to interfere). Evaluation of the defendants' alleged attempts to "obtain a more lax working environment" for John Brigadier will require the court to assess the parameters of the current working environment and the functioning of various Giant Eagle grievance procedures, again as created by the CBA. As the second *DeCoe* criterion is satisfied, preemption is clearly warranted.

Despite Craig's efforts at establishing the contrary, the court finds that the facts of this case are analogous to those in *Jones,* in which the Sixth Circuit upheld a district court's finding that a GM employee's suit for breach of settlement agreement was pre-empted under § 301. Jones brought his complaint in state court

> for breach of a settlement agreement. This agreement was arrived at by virtue of a grievance process established by a collective bargaining agreement, signed only by the parties engaged in collective bargaining, and promised reinstatement to a job whose terms and conditions are created by and subject to a collective bargaining agreement.

Id. Here, Craig brought his complaint in state court for various wrongs alleged to have caused his demotion and termination. His termination resulted from a grievance process established by a CBA, signed only by the parties engaged in collective

bargaining, and ended his tenure at a job whose terms and conditions were **[*6]** created by and subject to a CBA. Craig cannot distance the substance of his claims from similar suits which happen to bear the "breach of employment contract" label by means of artful pleading. *Terwilliger* v. *Greyhound Lines, Inc.,* 882 F.2d 1033, 1037 (6thCir. 1989), citing *Hyles v. Mensing,* 849 F.2d 1213 (9th Cir. 1988).

Moreover, Craig's situation is not merely analogous, but almost identical, to that of the plaintiff in *DeCoe,* who "brought a complaint against several of his co-workers for whom he had served as a ... supervisor. The workers had previously filed administrative proceedings against the plaintiff for alleged sexual harassment, and the plaintiff subsequently sued them for defamation, tortious interference, and intentional infliction of emotional distress." *Mattis* v. *Massman,* 355 F.3d 902,906 (6thCir. 2004), citing *DeCoe,* 32 F.3d at 214-15. The court in *DeCoe* found preemption of these claims based on the second of the requirements outlined in its opinion.

Finally, the court is mindful of the Sixth Circuit's exhortations toward liberality and flexibility in this area. "[The court is not bound by the 'well-pleaded complaint' rule, but rather, looks to the essence of the plaintiff's claim, in order to determine whether the plaintiff is attempting to disguise what is essentially a contract claim as a tort." *DeCoe,* 32 F.3d at 216, citing *Terwilliger,* 882 F.2d at 1037. "[S]ection 301 constitutes an exception

to the well-pleaded complaint rule because [its] pre-emptive force ... is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization." *Fox* v. *Parker Hannifin Corp.*, 914 F.2d 795, 799 (6th Cir. 1990), quoting *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust,* 463 U.S. 1, 23 (1983). Given these reminders, and the clear evidence presented by Giant Eagle that interpretation of the CBA will be necessary for a resolution of Craig's claims, the court finds that removal was proper and that remand is not warranted. **[*7]**

III. Conclusion

For the foregoing reasons, the court denies Craig's motion in its entirety. The parties shall proceed with discovery according to a schedule to be set by the court at a Case Management Conference, to be held on **July 15, 2005 at 11:00 a.m. in Chambers 17B.** As a result of this decision, Craig's motions to proceed with discovery (Docket No. 13), and requests for ruling (Docket Nos. 16 & 18) are denied as moot.

IT IS SO ORDERED.

sf Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: May 23, 2005

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(3)

No. 07-534

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

MATTHEW A. CRAIG,

Petitioner,

v.

JOHN BRIGADIER; SUSAN M. BRIGADIER; DAVID L. BRIGADIER; JACQUELYN F. LENSON; RISER FOODS COMPANY, d/b/a GIANT EAGLE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether or not this Court should grant review of this routine hybrid §301 action in which the lower courts correctly applied this Court's ample precedent in finding that Plaintiff's claims are completely preempted?

II. Whether or not this Court should grant review in this case despite Plaintiff's inability to identify any divergence among the Circuit Courts of Appeals from this Court's ample precedent in the area of preemption?

III. Whether or not this Court should grant review in this case even though Plaintiff's claims would undermine the well-settled deference that is to be accorded to labor arbitration awards?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The parent Company of Riser Foods Company d/b/a Giant Eagle is Giant Eagle, Inc. There is no publicly held Company that owns 10% or more of its stock.

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STATUTES AND RULES INVOLVED

The pertinent statutes and rules are printed in Respondent's Appendix 1-8.

COUNTERSTATEMENT OF THE CASE

On July 20, 2004, Plaintiff filed his initial Complaint in state court alleging that he was discharged from Giant Eagle and further claiming defamation and interference with contract resulting from an internal sexual harassment charge filed by Defendant John Brigadier, a minor employee of Defendant Giant Eagle. On August 5, 2004, Craig amended the Complaint to name John Brigadier's parents, David and Sue. Also named as a Defendant was Giant Eagle Human Resources Manager, Jackie Lenson. Pursuant to 28 U.S.C. §§1441, 1446, 28 U.S.C. Section 1331, and 29 U.S.C. §185, Defendants timely removed the case to District Court on the grounds that Plaintiff's claims were completely preempted under §301 of the Labor Management Relations Act under well established Supreme Court and Sixth Circuit authority. On September 14, 2004, Plaintiff filed his Motion to Remand. (R. 7).

On January 14, 2005, Plaintiff filed a Motion to Proceed with Discovery. (R. 13). Defendants opposed that motion on January 24, 2005, arguing that Craig had not demonstrated how discovery would impact determination of the legal question of complete preemption. (R. 14). On May 23, 2005, the District Court

entered its Mem orandum and Order Denying Plaintiff's Motion to Remand the Case, Denying the Motion to Proceed with Discovery, and setting a Case Management C nference for July 15, 2005. (R. 20) (Pet. Suppl. App x. 11-19). Pursuant to Federal Rule of Civil Procedure 26(d), discovery was stayed before the Case Managem nt Planning Meeting. On July 19, 2005, Defendan ts filed their Motion for Summary Judgment and a Motion for Protective Order to Stay Discovery Pend ing Ruling Upon Their Motion for Summary Judgm nent. (R. 25-27).

On March 3 0, 2006, the Court entered its Memorandum and Or der granting Defendants' Motion for Summary Judg nent and, denying as moot Defendants' Motion f r Protective Order. (R. 50-51) (Pet. Suppl. Appx. 1- 0). The Court ruled that Plaintiff's claims were cor npletely preempted and that Craig had failed to pr ove any Union misconduct in representing him, a necessary predicate for a breach of duty of fair repr sentation case. (Pet. Suppl. Appx. 9). The Court share d

> its determir ation that facts of Craig's case bear more than a passing resemblance to those in *De Coe v. General Motors Corporation*, 32 F.3 d 212, 216 (6th Cir. 1994), and *Jones v. Gen eral Motors Corp.*, 939 F.2d 380, 383 (6th Ci . 1991), cases in which the discharged pl intiffs raised claims such as defamation, tortious interference, and intentional inflic ion of emotional distress. The Sixth Circu t upheld the finding of preemption in tho e cases; the provisions of the

> L.M.R.A. must likewise govern the resolution of Craig's claims.

(Pet. Suppl. Appx. 9). The District Court found that Plaintiff's claims required interpretation of the collective bargaining agreement *Craig v. Brigadier*, No. 1:04-CV-1741, slip op. at 4-5 (N.D. Ohio March 30, 2006). (Pet. Suppl. Appx. 7). Plaintiff timely filed his Appeal. On June 4, 2007, the Sixth Circuit Court of Appeals upheld the decision of the District Court and denied a petition for rehearing on July 10, 2007. (Pet. Appx. 1-12).

STATEMENT OF THE FACTS

This case is simply an effort by a former union employee of Giant Eagle to attack collaterally his discharge from employment for gross insubordination. Plaintiff sued not only his former employer, but also its H.R. Manager, an employee who had complained about his inappropriate conduct, and even the boy's parents who he erroneously believes lodged a complaint with Giant Eagle on their son's behalf. Despite a final and binding Arbitrator's Award sustaining Plaintiff's discharge for insubordination, Craig nonetheless sought damages despite the fact that each and every one of his causes of action require interpretation of the Collective Bargaining Agreement which governed the terms and conditions of Plaintiff's employment at Giant Eagle.

Plaintiff Matthew A. Craig's employment with Defendant Giant Eagle was, at all relevant times, covered by a Collective Bargaining Agreement ("Agreement" or "CBA") between the Cleveland Food Industry Committee (Clerks) and United Food & Commercial Workers Union, Local No. 880. (Director of Human Resources Jean Colarik Declaration at ¶¶3-5). (R. 9, 11) (Resp. Appx. 10-21, excerpts from CBA). The Agreement includes provisions pertaining to management rights to set work rules and regulations, working conditions, seniority, and a binding grievance procedure. (R. 9, 11; Colarik Declaration at ¶10). In particular, *Article II – Management Rights* permits the Company to establish and maintain reasonable rules and regulations covering the operations of the store (Resp. Appx. 10-11). *Article IV – Working Conditions, Section 5* provides that employees may be required to acknowledge their familiarity with Company policy (Resp. Appx. 12). *Article IV – Working Conditions, Section 11(a)* provides that no employee shall be disciplined or discharged without just cause (Resp. Appx. 14). *Article V – Seniority, Section 8* provides that seniority shall be terminated or broken if an employee is discharged for just cause (Resp. Appx. 17). *Article XV – Grievance Procedure* provides for a four step grievance procedure culminating in final and binding arbitration. (R. 9, 11; Colarik Declaration at ¶10; Ex. 1) (Resp. Appx. 18-21). That grievance procedure is the exclusive method for resolving disputes relating to the Collective Bargaining Agreement. Article XV, Section 1 provides:

> Should any dispute or grievance arise under this Agreement, it shall be settled in accordance with the procedure set forth in this Article, and, except as otherwise specifically provided in this Agreement, this procedure is the sole and exclusive method of disposing of such grievances.

Article XV, Section 3 provides:

> The arbitrator's decision shall be issued within thirty (30) days after the dispute or grievance is submitted to the arbitrator and shall be final and binding upon the Employer, the Union, and the employee or employees involved.

Pursuant to express authority under the Agreement, Giant Eagle implemented a work rule that insubordination is grounds for discharge, and a sexual harassment policy, a mechanism for employees to complain to Giant Eagle if they believe they were subjected to sexual harassment, and a procedure for investigating such claims. (R. 9; Colarik Declaration at ¶¶12, 13 and 14; Exs. 3-4) (Resp. Appx. 23-32).[1] The Giant Eagle Policy also provides under "Disciplinary Action" that, "If it is determined that inappropriate conduct has been committed by one of

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[1] Pursuant to the Agreement, Matthew A. Craig signed an Acknowledgment of Familiarity with the Giant Eagle Handbook with its Policies and Procedures. (R. 9; Colarik Declaration at ¶11) (Resp. Appx. 22).

our employees, we will take such action as is appropriate." (R. 9; Colarik Declaration ¶12; Ex. 3) (Resp. Appx. 29-30).

On June 24, 2004, John Brigadier, who was then seventeen years old, lodged a complaint of sexual harassment against Plaintiff based upon Craig's statement to him, "Do you like girls?" Plaintiff admits making this statement. (R. 26; Lenson Declaration at ¶¶1, 4-5). (R. 26, Arbitrator's Decision) (Resp. Appx. 52). Pursuant to the Company's sexual harassment policy (as well as applicable law), Giant Eagle had the duty to investigate the claim promptly. (R. 9; Sexual Harassment Policy; Colarik Declaration filed October 1, 2004; Ex. 3, pp. 61-64) (Resp. Appx. 23-30).

After Defendant John Brigadier lodged the complaint of sexual harassment and after investigating that claim and other employee claims of harassment against Craig, the Company removed his title of "Manager-In-Charge" with no loss of pay. (R. 9; Colarik Declaration at ¶12).[2] Subsequently, on June 30, 2004, the Company held a meeting in response to Plaintiff's request to discuss the handling of the complaints against Craig by the Store H.R. Manager, Jackie Lenson. The meeting was attended by Larane

[2] Prior to the lawsuit, at no time did either of John's parents – David and Sue Brigadier have any contact with anyone at Giant Eagle regarding Plaintiff. (R. 26; ¶6 of David Brigadier and Sue Brigadier Declarations).

Hulsman, Vice President and Manager of Employee Relations, and Plaintiff. While Ms. Hulsman was reviewing the content of the sexual harassment charge that had been levied against him, Craig stated that the meeting was over and he started to leave. Ms. Hulsman said the meeting was not over and warned him that if he left the meeting, it would be considered insubordination, a terminable offense. Despite the warning, Matthew Craig then left the meeting and was discharged for insubordination. (R. 26, Arbitrator's Decision, Resp. Appx. 66, R. 9; Colarik Declaration at ¶13; R. 9; Hulsman Declaration at ¶¶3-6).

On July 13, 2004 (before he filed his Complaint in state court), Craig filed a grievance pursuant to the CBA challenging his demotion and termination from employment, and in which he made the following claims:

- that he was wrongfully discharged for stating that he might seek legal redress for alleged defamatory statements made against him by other employees of Giant Eagle (Grievance ¶9a);
- that the manner in which Giant Eagle management and human resource personnel handle sexual harassment claims was wrongful (Grievance ¶9c);
- that Giant Eagle management should change its criteria for assessing the legitimacy of sexual harassment claims; and that Giant

Eagle improperly "processes" such claims (Grievance ¶9c); and

- that his termination violated the "just cause" requirement of the Agreement (Grievance ¶ 10).

Craig demanded reinstatement and lost wages. (R. 9; Colarik Declaration at ¶15; Ex. 5, ¶¶9, 9a, 9b, 9c, 10; and demand for relief in grievance) (Resp. Appx. 35-37).

Pursuant to Article XV of the Agreement, the Union, the Plaintiff, and store management personnel met for a grievance meeting on July 27, 2004, and the Company denied the grievance.[3] The parties met again subsequently, and the Company again denied the grievance. Arbitration is the final and binding step under the exclusive grievance machinery to resolve "any dispute" under the Agreement. (R. 9, 11; Colarik Declaration at ¶¶16-19; Ex. 1, Article XV, Sections 1 and 3 CBA, p. 41) (Resp. Appx. 18, 20).

On July 20, 2004, Plaintiff filed his Complaint which he amended on August 5, 2004. (R. 1; Notice of Removal; Exs. F and I). In his First Amended Complaint ("FAC") (Pet. Appx. 14-30), Plaintiff alleges that he was discharged from Giant Eagle on July 1, 2004 (R. 1; FAC, ¶11); that up until June 25, 2004, he had never been subjected to disciplinary action by

[3] At this meeting, Plaintiff modified the grievance to delete all claims other than the contention he was discharged without just cause. (R. 9; Colarik Declaration; Ex. 8).

Giant Eagle (FAC, ¶12); that he is currently appealing his discharge and other alleged contractual violations which are subject to the Collective Bargaining Agreement between Defendant Giant Eagle and Local 880 (FAC, ¶16); and that Defendant Lenson, Human Resources Manager, upon learning of unsubstantiated allegations made against Plaintiff by employee John Brigadier and his parents Sue and David Brigadier, in the scope of her employment, "perpetuated {sic} the defamatory allegations against Plaintiff." (FAC, ¶¶37-39). Plaintiff lodged similar allegations against Defendant Lenson for slander in connection with publication of accusations of sexual harassment. (FAC, ¶¶43-46). Plaintiff also alleged that at the same time Lenson published the sexual harassment claims against Craig that she also orally accused him of voyeurism. (FAC, ¶¶48-50). Plaintiff further alleges that John Brigadier defamed him by accusing him of sexual harassment (FAC, ¶¶17-23); that David and Sue Brigadier (John's parents) defamed him (FAC, ¶¶24-34); that John Brigadier tortiously interfered with his employment/contractual relationship resulting in Plaintiff's demotion and discharge by Giant Eagle (FAC, ¶¶63-65); that David and Sue Brigadier tortiously interfered with employment/contractual relations resulting in Plaintiff's demotion and discharge by Giant Eagle (FAC, ¶¶66-69).

Plaintiff further alleges that Defendant Giant Eagle ratified and condoned Lenson's alleged slanderous and libelous actions (FAC, ¶¶52-54) and that the alleged defamation caused injury in the form of

ridicule and degradation of his reputation which has in turn resulted in his demotion and loss of employment. (FAC, ¶¶75-77). Craig further alleges that the concerted actions of the Brigadiers, Lenson, and employees of Giant Eagle have caused personal, professional, and financial injury to Plaintiff, including his demotion and subsequent discharge by Defendant Giant Eagle. (FAC, ¶78-80). All fourteen of the allegations in the complaint allege calculation to injure Plaintiff's contractual relationship with Giant Eagle and/or that Plaintiff suffered demotion, loss of employment, or discharge by Giant Eagle. (FAC, ¶¶22, 29, 33, 40, 45, 49, 57, 61, 65, 69, 74, 75-77, 78-80).[4]

On March 25, 2005, Plaintiff's grievance was heard in an arbitration hearing. On June 22, 2005, the Arbitrator issued her holding that Plaintiff was discharged for just cause (R. 26; Arbitrator's Decision, Resp. Appx. 69), that much of his testimony was not credible (R. 26; Arbitrator's Decision, Resp. Appx. 64-65,69), that he violated an explicit instruction and was guilty of insubordination (R. 26; Arbitrator's Decision, Resp. Appx. 66), that he would not benefit from progressive discipline (R. 26; Arbitrator's

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[4] Petitioner does not describe these multiple references to demotion, loss of employment and discharge in his description of the facts at page 5 of his petition. Moreover, contrary to Petitioner's assertions, he does allege discharge claims against Giant Eagle. See FAC, 75-77, alleging that Giant Eagle's actions resulted in loss of his employment.

Decision, Resp. Appx. 67-68), that his act of direct insubordination was very serious and interfered with the Company's business purpose of counseling him (R. 26; Arbitrator's Decision, Resp. Appx. 68), and that the Plaintiff had turned a deaf ear to all efforts to critique him (R. 26; Arbitrator's Decision, Resp. Appx. 67-68).

REASONS WHY THE PETITION SHOULD BE DENIED

I. Plaintiff's Claims Are Completely Preempted

This is a routine "hybrid §301 action"[5] in which Plaintiff seeks to evade an arbitration decision upholding his discharge for insubordination through artful pleading of purported state law claims. However, as the courts below properly recognized, his claims are completely preempted.

This Court has long recognized the broad preemptive powers of §301. *See Avco Corp. v. Aero Lodge 735*, 390 U.S. 557, 558-560 (1968) (plaintiff's action for breach of collective bargaining agreement arose under §301 and was removable even though the complaint did not mention federal law and appeared to plead an adequate claim under state contract law), as described in *Livadas v. Bradshaw*, 512 U.S. 107,

[5] Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 (hereinafter referred to as "§301"); *see Reed v. United Transportation Union*, 488 U.S. 319, 329-330 (1989).

122 n.16 (1994). *See also Beneficial National Bank v. Anderson*, 539 U.S. 1, 8 (2003) ("When the federal statute completely pre-empts the state law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law."); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1997) ("On occasion, the Court has concluded that the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well pleaded complaint rule.'" (citation omitted)); *Franchise Tax Bd. Of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23-24 (1983) (§301 has an unusually powerful preemptive force); and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 404 n.3 (1988) (" . . . issues raised in suits of a kind covered by §301 to be decided according to the precepts of federal labor policy").

In *Allis-Chalmers v. Lueck*, 471 U.S. 202, 213, 220 (1985), this Court held that claims are preempted when they are "inextricably intertwined with consideration of the terms of the labor contract" or are "substantially dependent" on it. There, the plaintiff alleged bad faith processing of an insurance claim under state law, but the Court held no matter how labeled, the claim was for a breach of a collective bargaining agreement. "[A]ny other result would elevate form over substance." *Allis-Chalmers*, 471 U.S. at 211-213. In *Electrical Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987), this Court reaffirmed that §301 governs claims founded directly on rights created by

collective bargaining agreements, and also claims "substantially dependent on analysis of a collective bargaining agreement," citing *Allis-Chalmers*, 471 U.S. at 220. *See also Lingle*, 486 U.S. at 410.[6] In *Lingle*, the Court went on to say that, "Today's decision should make clear that interpretation of collective bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor management relations only if such questions do not require construing collective bargaining agreements." *Lingle*, 486 U.S. at 411. Similarly, in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261 (1994), the Court once again affirmed the complete preemption doctrine holding, "[this Court has] recognized that where the resolution of a state-law claim depends on an interpretation of the CBA, the claim is preempted." (citing *Lingle*, 486 U.S. at 405-406, *Allis-Chalmers*, and *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962)).

Applying these basic principles, it is apparent that the District Court and the Court of Appeals correctly determined that Plaintiff's claims are

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[6] Petitioner acknowledges at page 14 of his Petition that the complete preemption doctrine covers complaints asserting rights created by a collective bargaining agreement or which allege "claims substantially dependent on CBA terms." Thus, he misstates the law when he asserts at page 13 of his Petition that, "Where adjudication of a state-law claim does not absolutely require interpretation of the meaning of a CBA term, the claim is 'independent' of the CBA and is not subject to LMRA preemption."

completely preempted no matter how labeled. Plaintiff's claims are in reality claims for wrongful discharge and demotion which require interpretation of the Agreement. Plaintiff's Complaint is replete with references to demotion, loss of employment, tortious interference with his contract, and discharge – all of which are governed by the terms of the CBA. Indeed, Plaintiff himself recognized that the purported state law claims that he now asserts in this case are intertwined with the collective bargaining agreement when he incorporated those same claims in his initial grievance challenging his discharge stating, "The following statements are made pursuant to the grievance procedure contained in Article XV of the collective bargaining agreement." (Resp. Appx. 35-40).

More particularly, all of Plaintiff's claims – which are variously styled as defamation, tortious interference, and conspiracies to defame and tortiously interfere – allege that Defendant's actions resulted in his discharge and loss of employment or injury to his contractual relationship with Giant Eagle. Those allegations necessarily require the Court to examine the causal connections, if any, between the alleged actions and his discharge. In order to conduct that examination, the Court must necessarily scrutinize the reasons for his discharge and their sufficiency under the CBA. In addition, this Court must determine the appropriate effect of the outcome of the grievance and arbitration procedure, and in particular the controlling impact of the Arbitrator's decision that Plaintiff was properly

discharged for his own insubordination, and not due to any of the actions of Defendants who he alleges accused him of sexual harassment. In other words, the Court must review the standards for discharge under the CBA, the policies issued pursuant to the CBA, the sufficiency of the reason for Plaintiff's discharge under those policies and the CBA, the scope of the grievance and arbitration procedure under the CBA, and the impact of an arbitrator's decision reached under that CBA. Plaintiff's claims are thus hopelessly and "inextricably intertwined" with the CBA.

In addition, each of the state law theories advanced by Plaintiff to attack his discharge are clearly preempted because the elements he must prove are intertwined with the CBA. As to his defamation claim concerning alleged reports that he had engaged in sexual harassment, he must prove "an unprivileged publication to a third party," and "fault amounting to at least negligence on the part of the publisher." *Akron-Canton Waste Oil v. Safety Kleen Oil Servs. Inc.*, 81 Ohio App. 3d 591, 601, 611 N.E.2d 955, 962 (9th Dist. 1992); *Lawson v. AK Steel*, 121 Ohio App. 3d 251, 256, 699 N.E.2d 951, 954 (1997). In order to evaluate these elements, the Court must interpret the Company's right under the CBA to implement the sexual harassment policy, the reasonableness of that policy, and the Defendants' application of that policy to determine whether any of the alleged reports were "unprivileged" and at "fault."

Similarly, with respect to Plaintiff's claims of tortious interference with contract, he must under Ohio law prove breach of the underlying contract. *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 650 N.E.2d 863, 864 (1995).[7] Here, the underlying contract is the CBA, and the Court must obviously interpret its terms to determine whether or not it has been breached – just as the Arbitrator has already done. *See Fox v. Parker Hannifin Corp.*, 914 F.2d 795 (6th Cir. 1990) (holding that tortious interference with contract claims are preempted if breach of contract is an essential element of the claim under state law.) Therefore, this claim is plainly preempted.

Plaintiff's attempts to avoid this manifest preemption by instead trying to rely upon interference with business relations fails for at least two reasons. First, the "business relations" involved here are governed by and set forth in the CBA, and the claim is therefore preempted. Second, under Ohio law, the tort of interference with business relations does not lie when the business relations have already been reduced to a contract: "The main distinction between tortious interference with a contractual relationship and tortious interference with a business relationship is that interference with a business relationship includes intentional interference with prospective

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[7] *Kenty* is the decision of the Ohio Supreme Court establishing the tort of interference with contract in Ohio. Yet Plaintiff has carefully avoided citing it in his Petition to this Court. *See Petition* at 19 n.6.

contractual relations not yet reduced to a contract." *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distributing Co., Inc.*, 148 Ohio App.3d 596, 604, 774 N.E.2d 775, 780-781 (3d Dist. 2002). Therefore, Plaintiff cannot escape the need to prove breach of the CBA and preemption by relabeling his tortious interference with contract claims as one for interference with business relations.

Plaintiff's conspiracy theories are not independent causes of action but are merely derivative of his claims for defamation and interference with contract. Under Ohio law, "a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action." *Minarik v. Nagy*, 8 Ohio App.2d 194, 195, 193 N.E.2d 280, 281 (8th Dist. 1963). Indeed, Plaintiff captioned those claims as "Civil Conspiracy to Defame" and "Civil Conspiracy to Tortiously Interfere with Employment/Contractual Relationship." Therefore, these conspiracy claims are preempted for the same reasons as his basic tort claims.

Finally, Plaintiff is simply wrong in his condescending assertion that claims against third parties cannot be preempted: "The notion that the LMRA cannot preempt a claim against a defendant where the defendant is not a party to a CBA should not come as a difficult concept." (Petition at 30). Indeed, the very case he cites in support of that proposition holds precisely the opposite. In *Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 997 F.2d 895, 899 (4th Cir. 1992), the Court held that a

claim against a non-signatory to a collective bargaining agreement for interference with contract is preempted where the state law requires a breach or termination of the contract as an element of the claim. Similarly, in *Kimbro v. Pepsico*, 215 F.3d 723, 727 (7th Cir. 2000), Judge Posner noted that state claims against third parties that require interpretation of collective bargaining agreements are preempted. Any other rule would suddenly allow collective bargaining agreements to be interpreted in state courts rather than in labor arbitration. Therefore, there is nothing "difficult" or unusual about the concept that such claims are preempted.

II. Plaintiff Has Mischaracterized the Decisions of the Sixth Circuit Court of Appeals and Has Not Remotely Established the Existence of a Conflict Among the Circuits.

In his zeal to seek review, Plaintiff has ignored the foregoing analysis demonstrating that the elements he must prove as part of his asserted state law claims result in preemption because they are intertwined with the CBA. Instead, he erects without foundation extreme mischaracterizations of Sixth Circuit decisions that correctly applied this Court's holdings on §301 preemption. For example, he contends that "in the Sixth Circuit's view, the mere existence of a collective bargaining relationship between the parties is sufficient to entangle any claims between the parties in the quagmire of LMRA preemption." (Petition at 17). He accuses the Sixth

Circuit in *DeCoe v. General Motors Corp.*, 32 F.3d 212 (6th Cir. 1994), of "delv[ing] into a CBA to locate terms that the Defendant might have raised as a defense, or that might have required interpretation if the Plaintiff had pled his claims differently, to determine if a court could resolve the claims without interpreting CBA terms." (Petition at 23). Plaintiff offers no logical basis for these exaggerated claims. He then attempts to create a split among the Circuits by citing cases that are merely factually distinct. (Petition at 20-21, 24). These unsupported mischaracterizations of the opinions of the Sixth and other Circuit Courts of Appeal do not form a basis for granting review.

Neither the Sixth Circuit's decision in this case nor in *DeCoe* are remotely as radical as Plaintiff represents to this Court.[8] On the contrary, as demonstrated above, the Court of Appeals decision in this case is well-founded upon the ample precedent of this Court in the area of §301 preemption. In both this case and *DeCoe*, it was the elements of the state law

[8] Plaintiff's attack on *DeCoe* is unique. A review of Shepard's Citations on Lexis-Nexis and Westlaw's Keycite on November 12, 2007, indicates that no Circuit Court of Appeals decision has rejected or even criticized *DeCoe* which has been cited by courts at least 123 times. Shepard's Citations does incorrectly show a criticism in *Valinski v. Edison*, 197 Fed. Appx. 403, 2006 U.S. App. LEXIS 20052 (6th Cir. 2006), an unreported case, but a review of that opinion shows that the Sixth Circuit was citing *DeCoe* favorably. Thus, none of the Courts of Appeals have recognized any divergence in *DeCoe* or any split among the Circuits in this area of preemption.

claims that a plaintiff must affirmatively prove that resulted in preemption, and in neither case did the Court of Appeals "delve into" a collective bargaining agreement to search for defenses. Indeed, where state law requires proof of a breach of the CBA (the very purpose of labor arbitration) as one of those elements that Plaintiff must prove, it is hardly remarkable that the Court of Appeals found preemption under governing Supreme Court law.

Although Plaintiff claims that some sort of conflict exists among the Circuits, he makes no real effort to tell the Court where that conflict might be. Rather than demonstrating a conflict, he lines up a number of cases that found preemption against a list that did not. He then offers the following bald and unsupported assertion: "The much [sic] of the conflict between the decisions in the above cases arises from the construction of conclusions rather than application of facts to an exacting legal test." (Petition at 24). He thus asks this Court to try to find a conflict among the Circuits even though he cannot. However, even casual review of these cases shows that the distinction between the outcomes is factual: where the elements of the claims are intertwined with the collective bargaining agreements, they are preempted; where the claims are independent from the collective bargaining agreements, they are not. Those factual distinctions do not form a basis to grant review, and this Court should not have been asked to waste its time trying to find a conflict in law when Plaintiff himself has not been able to locate one.

III. This is a Poor Case for Review Because the Record is Clouded by Plaintiff's Efforts to Evade the Labor Arbitration Decision that Found that He Was Properly Discharged for Insubordination.

Like his careful attempt at artful pleading around §301, Plaintiff has artfully avoided informing this Court of the outcome of the arbitration award concerning his discharge grievance. That award confirmed that he was properly discharged for insubordination for walking out on a counseling session concerning his inappropriate behavior. Thus, while the Plaintiff now invites this Court to resolve invented and non-existent differences among the Circuits on preemption, the real "quagmire" that Plaintiff asks the Court to enter is not the doctrine of preemption, but instead the opportunity to undercut the half-century old cornerstone of labor law that rests upon the "Steelworkers Trilogy." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior and Gulf*, 363 U.S. 574 (1960); and *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). Any decision by this Court to grant review would undercut the sanctity of arbitration as the means of resolving disputes that arise in the collective bargaining setting because Plaintiff's claims are flatly contrary to the decision of the Arbitrator. She found that he was properly discharged for his own insubordinate acts, and not because others complained about his sexual harassment as he alleges. By granting the Petition in

this case, the Court must thus cast aside both the doctrine of collateral estoppel and the respect so long accorded by the Supreme Court and Congress to the labor arbitration process. Plaintiff's evasive conduct and arguments are not the fodder for such a colossal reversal of precedent and national policy.

That national policy favoring labor arbitration requires that appropriate deference be given to the labor arbitration decision in this case. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). That deference is in fact controlling here because all of Plaintiff's claims are barred by the doctrine of collateral estoppel (or "issue preclusion"), the four essential elements of which are as follows: 1) the issue precluded must be the same one involved in the prior proceeding; 2) the issue must actually have been litigated in the prior proceeding; 3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; and 4) the prior forum must have provided the party against whom estoppel is asserted a full and fair opportunity to litigate the issue. *N.L.R.B. v. Master Slack and/or Master Trousers Corp.*, 773 F.2d 77, 81 (6th Cir. 1985), quoted in *Central Transport, Inc. v. Four Phase Systems, Inc.*, 936 F.2d 256, 259 (6th Cir. 1991). Here, the Arbitrator found that Plaintiff was properly terminated for violation of the rule against insubordination. (Resp. Appx. 66, 69). The reason for his discharge was in fact litigated before the Arbitrator, its determination was necessary to the outcome, and Plaintiff had a full and fair opportunity to litigate

that issue. Also, it was he who chose to abandon the other claims in his grievance. (Resp. Appx. 51). Therefore, he cannot now be heard to claim that the real reasons for his discharge were the statements and/or conspiracies of the various Defendants about his involvement in sexual harassment. Accordingly, all of his claims are barred.

Moreover, Plaintiff's attempts to plead and to argue around the arbitration decision make this case an extremely poor one for review. The assumed "facts" upon which Plaintiff rests his arguments are false and contradict the decision of the Arbitrator and the actual facts underlying this case. The Arbitrator's decision confirms that his discharge was caused by his own insubordination, yet his Complaint alleges that it was caused by the statements of others concerning his sexual harassment. Thus, Plaintiff's arguments rely upon a confused factual record that cannot withstand scrutiny and cannot be distilled for the purposes of review. This Court's decisions from the Steelworkers Trilogy, *Misco*, and the many decisions on preemption already provide ample testimony to the deference to be accorded to labor arbitration and preemption, and an additional opinion based upon this ambiguous and untidy record is unlikely to offer further refinement or guidance on these landmark principles of federal labor law.

CONCLUSION

There is no reason why this Court should grant the Petition for Writ of Certiorari in this case. In its unpublished opinion, the Sixth Circuit Court of Appeals merely applied well-settled law in concluding that Plaintiff's collateral attack on the arbitration award against him is preempted under §301. That decision does not conflict with any decision of this Court or any other Court of Appeals. Plaintiff has identified no conflict among the Courts of Appeals on the subject of §301 preemption, nor is there any question of federal law presented in this case that has not already been decided by this Court. Accordingly, there is no basis upon which to grant the Petition in this routine §301 action.

Respectfully submitted,

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APPENDIX A – STATUTES AND RULES

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§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division

embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section

1446(b) of this chapter may be enlarged at any time for cause shown.

(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the data on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this sub-section and the district court to which it is removed or transferred under section 1407(j) has made

a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over, the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further, review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

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§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further,

except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

FRCP 26(d)

(d) Timing and Sequence of Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

APPENDIX B

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT

AGREEMENT BETWEEN

Cleveland Food Industry Committee (Clerks)

and

United Food & Commercial Workers Union Local No. 880

---

880 *UFCW*

Effective
September 9, 2002

Expiration
September 11, 2005

James B. Jerele
President

Thomas H. Robertson
Secretary-Treasurer

* * *

ARTICLE II
Management Rights

In addition to the management rights specified elsewhere in the Agreement, the management of the business and the direction of the work force, including, but not limited to the right to plan, direct, and control store operations; to establish merchandising and pricing policies; to hire, suspend, or discharge for

just cause; to assign and allocate work; to transfer employees because of lack of work or for other legitimate reasons; to study or introduce new or improved methods or facilities; to establish and maintain reasonable rules and regulations covering the operation of the store; and to carry out the ordinary and customary functions of management are vested exclusively in the Employer, except to the extent modified by this Agreement, and provided further, that the Employer shall not exercise such rights in an arbitrary or capricious manner.

* * *

ARTICLE IV
Working Conditions

Section 1. Head Cashiers and all other Cashiers shall do all book work on Company premises.

Section 2. No employee shall be required to work in two (2) stores in the same day, except in case of permanent transfer, emergency, or mutual consent between the Employer and employee.

Section 3(a). All employees normally scheduled for thirty-two (32) hours or more per week shall be given one (1) week's notice or one (1) week's pay in lieu of notice in the event of a layoff.

Section 3(b). The Employer shall give employees of a store to be closed two (2) week notice of a store closing, and the Union shall receive such notification in advance of the employees, except in the event of an

emergency closing or where the Employer lacked knowledge in sufficient time to give such notice.

Section 4. The Employer shall continue its past practice on providing employees with work apparel and will provide rain gear for employees who perform carry-out service.

Section 5. The Employer may require employees to initial Employer policy and rules to verify that those policies and rules have been read and that the employees are familiar with their contents. Employer policies and rules which employees are required to initial shall be posted in each store and furnished to the Union upon request.

Section 6(a). The Union shall furnish the Employer orientation kits to be distributed to newly hired and rehired employees. All completed forms filled out by new or rehired employees will be forwarded by the Employer to the Union Office immediately upon hire. Such forms are self-addressed, and postage paid by the Union.

Section 6(b). The Employer shall submit to the Union a list of employee terminations, leaves of absence, and permanent transfers with each monthly dues report.

Section 6(c). In January and July of every year, each Employer shall supply the Union with store seniority lists of all employees by classification. In addition, upon request by the Union (not more than semi-annually), a company-wide seniority list is to be

provided which shall include name, date of hire, store, and classification.

Section 7. Union Representatives shall be allowed to enter stores to conduct Union business when the store is open for business or when outside salesmen are in the store.

Section 8(a). The Employer recognizes the right of the Union to select a Steward at each store to represent the employees on grievances concerning the interpretation or application of this Agreement. Union Stewards shall be allowed a reasonable amount of time to perform this function during their regular working hours.

Section 8(b). The Union Steward shall be considered to have the longest seniority for purposes of layoff or in the reduction of scheduled hours.

Section 8(c). Providing there is no disruption of the Employer's operations of business, Union Stewards shall be scheduled for the night off to attend Stewards meetings and the regular area meeting.

Section 8(d). Union Stewards who work the day shift shall have the right to be scheduled the first available shift within their classification within their store.

Section 8(e). No Union Steward shall be transferred, except for incompetency, unless such transfer is agreed to by the Steward or the Union.

Section 8(f). In stores with more than seventy-five (75) employees in the bargaining unit, the Union may appoint one (1) Assistant Steward to act as Steward when the Union Steward is not working. Such assistant shall not be subject to Paragraphs (b), (d), and (e) of this Section.

Section 8(g). The Employer will pay annually up to one (1) day's pay for one Union Steward per store to attend the Local Union's Annual Union Steward Seminar(s).

Section 9. All stores shall provide bulletin board space for Official Union notices signed and approved by an Officer or Union Representative of the Union.

Section 10. The Union and the Employer agree that in the hiring or employment of employees there shall be no discrimination against an employee or against any applicant for employment because of race, sex, creed, national origin, age, or disability. It is also agreed that there shall be no discrimination against any employees who exercise their right to aid and assist the Union or make claims under this Agreement.

Section 11(a). No employee shall be disciplined or discharged without just cause.

* * *

ARTICLE V
Seniority

Section 1. Seniority shall be defined as the length of continuous service of an employee. For a full-time employee, seniority shall be measured within classification on a company-wide basis (unless other areas are agreed upon between the Union and a Company) and shall be measured from the employee's last date of hire. For a part-time employee, seniority shall be measured within classification on a store-wide basis and shall be measured from the employee's last date of hire.

Section 2. No rights or privileges shall be lost by any full-time employee (forty [40] hours per week for six [6] months) because of the changes in language from the 1984-1987 Agreement to the language in this Seniority Article.

Section 3. All new employees shall be on probation for sixty (60) days, and the Employer shall have exclusive control over such probationary employees, including, but not limited to, the right to discipline or discharge.

Section 4. In regard to layoffs and recalls (reinstatement after layoff), an employee's classification seniority shall be considered along with his or her experience and ability to perform the available work, and if all other considerations are reasonably equal, seniority shall be the controlling factor. Provided, that notwithstanding anything to the contrary in this

Article, temporary layoffs (i.e., not longer than one [1] week) shall be on a store-wide basis.

Section 5(a). An employee who normally works thirty-four (34) hours or more per week who suffers a substantial reduction in his or her normal weekly schedule for an extended period of time shall have the right to transfer to another store to displace the least senior employee who is working thirty-four (34) hours or more per week.

Section 5(b). For purposes of this Section, the following definitions shall apply:

1. An employee's normal weekly schedule shall be the hours scheduled during the previous eight (8) weeks, but excluding additional hours that resulted from vacations, illnesses, holidays, new store openings, and similar circumstances that would temporarily inflate an employee's schedule.

2. Substantial reductions are reductions of ten (10) hours or more of a normal weekly schedule.

3. An extended period shall be any period of six (6) weeks or more.

Section 5(c). No right to transfer may arise under this Section until the affected employee submits to the Employer a written request for such transfer and in order to transfer, the employee must be qualified to perform the work within the job classification of the job requested.

Section 5(d). If a mistake is made in the implementation of this Section, the Employer shall not be liable for any back pay if the mistake is corrected within two (2) days after receiving notification from the Union of the mistake.

Section 6. Employees may be transferred for the business needs of the Employer, but the Employer shall make no transfers that are discriminatory, punitive, or arbitrary. When an employee is transferred to a different store, the Employer shall be required to make an effort to assign the employee to a store that is close to his or her home.

Section 7. In cases of temporary transfers for the benefit of the Employer which involve additional transportation costs, the employee shall be reimbursed for the additional expenses at a rate of thirty-one cents ($.31) per mile.

Section 8. Seniority shall be terminated or broken for the following reasons:

a. Voluntary quit;

b. Discharge for cause;

c. Layoff exceeding twelve (12) consecutive months;

d. Failure to report for work within three (3) days after receipt of a written recall notice;

e. Reduction from full-time to part-time status for more than one (1) year (but such an employee's part-time seniority shall be measured from his or her last date of hire).

* * *

ARTICLE XV
Grievance Procedure

Section 1. Should any dispute or grievance arise under this Agreement, it shall be settled in accordance with the procedure set forth in this Article, and, except as otherwise specifically provided in this Agreement, this procedure is the sole and exclusive method of disposing of such grievances.

Step 1.

In order to be considered as a grievance under this Article, a dispute or grievance shall be submitted to the Employer in writing within fourteen (14) days after the occurrence of the incident causing such dispute or grievance, or within fourteen (14) days from the date when the employee or Union became aware or reasonably should have become aware of the incident or events in question, but in no case more than one (1) year from the incident or event giving rise to the dispute.

Step 2.

There shall be an effort on the part of the parties to settle and resolve any dispute or grievance and the Employer shall answer all disputes or grievances in writing within fourteen (14) days after the receipt of same.

Step 3.

If the grievance is not satisfactorily settled in Step 2, the Union has two (2) weeks from receipt of the Step 2 answer to submit a written appeal to an appropriate management administrative official. A meeting shall be held between Employer and Union officials and a final written answer shall be issued by the Employer within one (1) week of the meeting. Provided, that the parties may agree to hold additional Step 3 meetings without loss of rights under this Article.

Step 4.

In the event that the parties are unable to settle or resolve a grievance, the Union may refer the grievance to arbitration by requesting the Federal Mediation and Conciliation Service or the American Arbitration Association to submit a panel of arbitrators. Within fourteen (14) days of receipt of the first panel, the Employer and Union may mutually agree to request the Agency to submit additional panels of arbitrators. The arbitrator shall then be selected in accordance with the Agency's then applicable rules, unless the Employer and the Union agree to select the arbitrator in some other manner.

Section 2. The Union may refer a dispute or grievance which has not been resolved to arbitration on the forty-fifth (45th) day after the dispute or grievance has been submitted in writing to the Employer in Step 1, or at any time thereafter. The Union must

refer a dispute or grievance to arbitration no later than thirty (30) days after the last Step 3 meeting is held.

Section 3. The arbitrators decision shall be issued within thirty (30) days after the dispute or grievance is submitted to the arbitrator and shall be final and binding upon the Employer, the Union, and the employee or employees involved. The expenses of the arbitrator shall be borne equally by the Employer and the Union.

Section 4. The time limits specified in Section 1 above may be extended by mutual agreement but shall otherwise be enforced in that the dispute or grievance shall be decided against any employee or party failing to observe the time limits.

Section 5. In the event a grievance goes to arbitration, this Agreement, including any Supplements or Addenda, shall be the basis on which the arbitrator's decision is rendered, and in reaching his or her decision the arbitrator shall have no authority to amend, modify, or in any way change its terms.

Section 6. At any step in this grievance procedure, the Executive Board of the Local Union shall have final authority in respect to any aggrieved employees covered by this Agreement to decline to process further a grievance, complaint, disagreement or dispute if in the judgment of the Executive Board such grievance or dispute lacks merit or justification under the terms of this Agreement, or has been adjusted or rectified under the terms of

this Agreement to the satisfaction of the Union Executive Board.

Section 7. In the investigation and processing of a dispute or grievance, the Union and the Employer shall upon request provide each other all relevant and pertinent records, papers, and data including the names of any and all witnesses whose testimony would have bearing on the grievance, except where a failure to follow established check-out procedure may be involved or where the security of the Union and/or the Employer would be at issue.

* * *

APPENDIX C

SEXUAL HARASSMENT POLICY AND WORK RULES AND PETITIONER'S ACKNOWLEDGEMENT OF RECEIPT

DEFENDANT'S EXHIBIT 2

Handbook Acknowledgement Statement

Human Resources Retail –
New Hire Training Program
Employee Acknowledgement Statement

Description: Acknowledgement of receipt of the Giant Eagle Employee Handbook and an affirmation that the New Hire understands that violation of the Company's Policies and Procedures can result in termination.

TO: Giant Eagle

This is to acknowledge that I have received and read the Giant Eagle Employee Handbook.

It is my understanding that any violation of the Company's Policies and Procedures can make me subject to various disciplinary actions up to, and including, termination.

I understand that I am expected to, and will, observe and abide by all amended and additional rules and regulations.

/s/ Matthew A. Craig	7/29/03
Employee Signature	Date

NOTE: This is a signed employee statement. One copy will be kept in your personnel file.

This booklet is for personal reference and is yours to keep.

DEFENDANT'S EXHIBIT 3

EMPLOYEE HANDBOOK

SEXUAL HARASSMENT POLICY

Summary

Giant Eagle will promote a workplace that is free of sexual harassment.

Giant Eagle is committed to providing a workplace free of sexual harassment. Sexual harassment of employees in the workplace or in other settings in which employees may find themselves in connection with their employment is unlawful and will not be tolerated. Further, any retaliation against an individual who has complained about sexual harassment or retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is similarly unlawful and will not be tolerated. To achieve our goal of providing a workplace free from sexual harassment, the conduct that is described in this policy is prohibited. If such conduct does occur, a procedure to investigate reported incidents has been established and communicated to employees.

Giant Eagle takes allegations of sexual harassment seriously and we will respond promptly to complaints of sexual harassment. Where it is determined that such inappropriate conduct has occurred, we will act promptly to eliminate the conduct and impose such corrective action as is necessary including disciplinary action up to, and including, termination.

Definition of Sexual Harassment

Sexual harassment includes unwelcome sexual advances, requests for sexual favors and verbal or physical conduct of a sexual nature when:

- Submission too rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or a basis for employment decisions.
- Such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.
- Any unwelcome E-mail communication or viewing, downloading or transmitting sexually explicit or offensive material from the Internet also constitutes creating a hostile work environment.

Under these definitions, direct or implied requests by a supervisor for sexual favors in exchange for actual or promised job benefits such as favorable reviews, salary increases, promotions, increased benefits or continued employment constitutes sexual harassment.

The legal definition of sexual harassment is broad. In addition to the above examples, other sexually oriented conduct that is unwelcome and has the effect of creating a work place environment that is hostile, offensive, intimidating or humiliating to male or

female workers, whether it is intended or not, may also constitute sexual harassment. While it is not possible to list all examples of sexual harassment, the following list contains additional types of conduct, which, depending upon the totality of the circumstances including the severity of the conduct and its pervasiveness may constitute sexual harassment:

- Unwelcome sexual advances – whether they involve physical touching or not;
- Sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life, commenting on an individual's body, commenting about an individual's sexual activity, deficiencies or prowess;
- Displaying sexually suggestive objects, pictures, cartoons,etc.;
- Unwelcome leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments; and
- Inquiries into one's sexual experiences

Retaliation against an individual who has complained about sexual harassment and retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is unlawful and will not be tolerated.

Complaints of Sexual Harassment

If any employee believes that he or she has been subjected to sexual harassment, the employee has the

right to file a complaint with our organization. This may be done in writing, or orally, by contacting Ray Huber, Vice President, Human Resources or anyone on the list below:

COMPANY	PRIMARY CONTACT PERSON(S)
Aetos Construction Co.	Steve Tassaro, VP; Michele Reuss, Director, Human Resources; Marianne Behrens, Manager, Human Resources; Ray Huber, VP, Human Resources
Butler Refrigerated Meats, Inc.	Larry Baldauf, VP, Distribution; Michele Reuss, Director, Human Resources; Nathan Book, Specialist, Human Resources; Ray Huber, VP, Human Resources
Giant Eagle, Inc.	Ray Huber, VP, Human Resources; Michele Reuss, Director, Human Resources; Marianne Behrens, Manager, Human Resources
HBC Service Co.	Larry Baldauf, VP, Distribution; Michele Reuss, Director, Human Resources; Walt Durr, Manager, Human Resources; Ray Huber, VP, Human Resources

OK Grocery	Larry Baldauf, VP, Distribution; Michele Reuss, Director, Human Resources
Pharmacy	Randy Heiser, VP, Pharmacy, Michele Reuss, Director, Human Resources; Marianne Behrens, Manager, Human Resources
Retail Promotions	Michele Reuss, Director, Human Resources; Marianne Behrens, Manager, Human Resources; Ray Huber, VP, Human Resources
Tamarkin	Larry Baldauf, VP Distribution; Michele Reuss, Director, Human Resources; Jeannie Kieffer, Manager, Human Resources; Ray Huber, VP, Human Resources
American Seaway Foods	Larry Baldauf, VP Distribution; Michele Reuss, Director, Human Resources; Kelly McCormick, Manager, Human Resources, Ray Huber, VP, Human Resources
Giant Eagle Retail – COD	Jean Colarik, Director, Human Resources; Larane Hulsman, Manager, Employee Relations; Ray Huber, VP, Human Resources

Giant Eagle Retail – POD	Dale Giovengo, Director, Human Resources; Karen Priore, Manager, Employee & Labor Relations; Bruce Fox, Manager, Employee & Labor Relations; Ray Huber, VP, Human Resources
Giant Eagle Retail – COL	Dale Giovengo, Director, Human Resources; Karen Priore, Manager, Employee & Labor Relations; Ray Huber, VP, Human Resources
Giant Eagle Retail – MOD	Dale Giovengo, Director, Human Resources; Kelly Lee, Manager, Employee & Labor Relations; Ray Huber, VP, Human Resources

These persons are also available to discuss any concerns you may have and to provide information to you about our policy on sexual harassment and our complaint process. If for some reason you believe you cannot contact any of the above listed persons, please contact any officer of Giant Eagle.

Sexual Harassment Investigation

When we receive the complaint, we will promptly investigate it in a fair and expeditious manner. The Human Resource Department will conduct all investigations of sexual harassment. The investigation will be conducted to maintain confidentiality to the extent

practicable. Our investigation will include a private interview with the person filing the complaint and with witnesses. We will also interview the person alleged to have committed sexual harassment. When we have completed our investigation, we will, to the extent appropriate, inform the person filing the complaint and the person alleged to have committed the conduct of the results of the investigation. It may be necessary to suspend an employee pending investigation.

If it is determined that inappropriate conduct has occurred, we will act promptly to eliminate the offending conduct and where it is appropriate we will also impose disciplinary action.

Giant Eagle will not tolerate job-related sexual harassment. Furthermore, any form of sexual harassment must not be sanctioned or accepted by any employee of the Company. All employees are responsible for maintaining a workplace free from sexual harassment. Managers, supervisors and employees are obligated to promptly report incidents of sexual harassment to Ray Huber, Vice President Human Resources or your Human Resource Manager.

Disciplinary Action

If it is determined that inappropriate conduct has been committed by one of our employees, we will take such action as is appropriate. Such action may range from counseling to termination from employment and may include such other forms of disciplinary action as

we deem appropriate. This policy sets forth our goal of promoting a workplace that is free of sexual harassment. The policy is not designed or intended to limit our authority to discipline or take remedial action for workplace conduct, which we deem unacceptable, regardless of whether that conduct satisfies the definition of sexual harassment.

WORK RULES/PROHIBITED ACTS POLICY

Summary

The orderly and efficient operation of the store requires that employees maintain proper standards of personal conduct at all times. Proper standards of conduct are necessary to protect the health and safety of all employees, to maintain uninterrupted production and to protect the Company's goodwill and property.

Giant Eagle sets forth is established work rules which, together with all other proper standards of conduct, employees are required to obey.

I. Any of the following may subject an employee to Company disciplinary action, up to, and including, termination.

1. Customer complaints.
2. Careless work and/or cash shortage.
3. Tardiness or absenteeism.
4. Smoking or consumption of food or drink other than at authorized time (food purchases must have sales slip attached).

5. Practical jokes or horseplay.

6. Disobeying safety instructions.

7. Failure to report injuries immediately to store management.

8. Failure to punch his/her own time card at starting time, lunch, breaks and quitting time.

9. Creating or contributing to unsanitary conditions, poor housekeeping or failure to comply with county, state and USDA rules and regulations.

10. Failure to cooperate with and/or submit to security checks on Company premises.

11. Unauthorized solicitation of employees or unauthorized distribution of literature

II. The following is a partial list of violations that may be cause for immediate termination.

1. Misuse or unauthorized removal or appropriation of property belonging to the Company, another employee or customer.

2. Off-duty drug trafficking.

3. Falsifying any reports or records or providing false information, including time records and employment applications.

4. Indecent behavior while on store premises.

5. (a) Drinking or possession of intoxicating liquor on Company property.

   (b) Bringing in, having in possession, using, transferring or selling any form of narcotic and/or drug on Company premises at any time.

   (c) Under the influence of alcohol or drugs during work shift.

6. Abuse or destruction of Company, customers' or fellow employees' property.

7. Gross discourtesy or use of profanity toward customers or employees.

8. Presence of any unauthorized personnel in the pharmacy area or Eagle's Nest area.

9. Coupon stuffing: Improper use of coupons including Catalina coupons and coupons designed or intended for another person.

10. Use of your personal Giant Eagle Advantage Card® for customers' purchases.

11. Violation of the federal, state or local guidelines in regard to the sale of alcoholic beverages, tobacco or lottery sales.

12. Failure to accurately register sales.

13. Gross insubordination or refusal to follow supervisor's orders.

14. Provoking, instigating or participating in any act or violence, fighting or brawling.

15. Unauthorized stopping of work before scheduled lunch period or scheduled quitting time.

16. Leaving work without the permission of your manager.

17. Sleeping on duty.

APPENDIX D

PETITIONER'S INITIAL GRIEVANCE

[LOGO] **880 *UFCW***

United Food & Commercial Workers Union Local 880

[Names And Addresses Omitted In Printing]

July 13, 2004

Ms. Jean Colarik
Giant Eagle – Cleveland Division
5300 Richmond Road
Bedford Heights, Ohio 44146

RE: MATTHEW CRAIG

Dear Ms. Colarik:

Enclosed is a copy of a grievance from the above-captioned member. It is self-explanatory.

Please respond, upon receipt of this letter, in order to resolve this matter.

Very truly yours,

UFCW LOCAL 880

/s/ Samuel J. Barber
Samuel J. Barber
Union Representative

SJB/kac

Enclosure

Matthew A. Craig
11325 Cheyenne Trail, Suite 302
Parma Heights, OH 44130
Home Phone 440-888-2280

July 12, 2004

Jean Colarik, Human Resources Director
Giant Eagle, Inc.
5300 Richmond Road
Bedford Heights, OH 44146

GRIEVANCE UNDER COLLECTIVE BARGAINING AGREEMENT

The following statements are made pursuant to the grievance procedure contained in Article XV of the Collective Bargaining Agreement (hereinafter "the Agreement") by and between Cleveland Food Industry Committee (hereinafter "the Committee") and United Food & Commercial Workers Union Local No. 880 (hereinafter "the Union"), effective September 9, 2002, and expiring September 11, 2005:

Background Facts

1. Riser Foods Company, doing business as Giant Eagle, Inc. (hereinafter "GE"), is a member of the Committee and is subject to the Agreement.

2. Matthew A. Craig (hereinafter "Employee") was hired as a Part-Time Grocery Clerk by Giant Eagle #0185, Middleburg Heights, Ohio (hereinafter "Employer"), and began work on July 27, 2003.

3. Employee was regularly employed by Employer until his termination on July 1, 2004.

4. Upon hire, Employee entered into the Agreement and became subject to the provisions thereof.

5. Up until the time of the occurrence of the events that have caused this formal grievance to be brought, Employee had never been subjected to disciplinary action by Employer.

6. During the term of his employ, Employee received several awards and pay increases for service to the Employer beyond that which was required.

7. During the later part of March, 2004, Employee was promoted to the "Manager in Charge" position and regularly served as closing manager for the store until his demotion on June 25, 2004.

8. Employee received a pay increase soon after and corresponding to being promoted to the "Manager in Charge" position.

Grievances

9. On July 1, 2004, Employee was wrongfully discharged in violation of public policy when Employee was discharged:

   a. After having suggested on the previous day during a voluntary meeting with Larane Hulsman, Manager of Employee Relations/ Recruiting, that he might seek legal redress for defamatory statements made against Employee by other employees of GE and;

b. After having outwardly manifested an intent before Dennis Hummel, Store Manager of store #0185 (hereinafter "Hummel'), Jackie Lenson, Human Resources Manager for store #0185 (hereinafter "Jackie"), and a union steward on June 28, 2004, to file sexual harassment charges against Hummel and other management of store #0185 based on management's regular use and condolence of sexually explicit profanity, jokes, and other language and;

c. After having complained of the current manner in which GE management and human resource personnel handle sexual harassment claims made against employees and advocating the need for GE management to change its criteria for assessing the legitimacy of sexual harassment claims as well as the manner in which GE "processes" such claims so that countless other employees would also not be made to defend unwarranted claims nor be unfairly condemned by GE management or human resource personnel prior to the conclusion of an investigation into a claim having merit. Employee's assertions regarding these unacceptable employment conditions were made to human resource personnel, Hummel, and a union steward on several occasions, including June 25, 2004, June 28, 2004, and June 30, 2004.

10. Termination of Employee on July 1, 2004, was also in violation of Article IV, section 11(a) of the Agreement and in violation of GE's own policy regarding termination for just cause.

11. Employer has failed to provide Employee with one week notice or wages equal to one week's pay upon his termination, in violation of Article V, section 13 of the Agreement.

12. Employer has refused to provide Employee, in writing, the basis for Employee's demotion from the "Manager in Charge" position on June 25, 2004.

13. Employer has continually refused to allow Employee to examine written statements by other employees who have made allegations against Employee which have materially and adversely affected Employee's status and reputation.

14. Jackie refused to accept Employee's oral claim of sexual harassment by management of store #0185, on June 28, 2004, in violation of GE's own sexual harassment policy.

15. Employer has failed to remit earned wages to Employee for weeks ending June 26, 2004, and July 3, 2004.

16. Employer has failed to remit mileage reimbursement for expenses incurred by Employee on June 30, 2004, when traveling from Employer to Giant Eagle offices located in Bedford Heights, Ohio, for a scheduled meeting.

17. Employer told Employee that Employee would only be permitted a half an hour lunch break when serving as "Manager in Charge", in violation of Article III, section 8 of the Agreement.

18. Employer has continuously failed to post work schedule by 1:30 P.M. on Friday as required by Article III, section 13 of the Agreement.

19. Employer has violated of Article III, section 9 of the Agreement on several occasions as it concerns the Employee.

Demand for Relief

WHEREFORE, Employee demands the following:

a. Reinstatement of his employment position.

b. Lost wages incurred by Employee for weeks ending July 3, 2004, and July 10, 2004, as a result of the violations set forth in paragraphs 9 and 10.

c. Wages to which Employee is entitled as set forth in paragraph 11.

d. The granting of documentation requests made by Employee but which have previously been rejected, as set forth in paragraphs 12 and 13.

e. Remittance of wages earned by Employee for weeks ending June 26, 2004, and July 3, 2004.

f. Remittance of mileage reimbursement for expenses incurred by Employee as set forth in paragraph 16.

g. Any other relief that is fair and just.

MATTHEW A. CRAIG

/s/ Matthew A. Craig

cc: Sam Barber, UFCW Union Local 880, 2828 Euclid Avenue, Cleveland, OH 44115

APPENDIX E

SUMMARY OF PERTINENT COLLECTIVE BARGAINING AGREEMENT, SEXUAL HARASSMENT POLICY, AND WORK RULE PROVISIONS

Article II, Management Rights

In addition to the management rights specified elsewhere in the Agreement, the management of the business and the direction of the work force, including, but not limited to the right to plan, direct, and control store operations; to establish merchandising and pricing policies; to hire, suspend, or discharge for just cause; to assign and allocate work; to transfer employees because of lack of work or for other legitimate reasons; to study or introduce new or improved methods or facilities; to establish and maintain reasonable rules and regulations covering the operation of the store; and to carry out the ordinary and customary functions of management are vested exclusively in the Employer, except to the extent modified by this Agreement, and provided further, that the Employer shall not exercise such rights in an arbitrary or capricious manner.

Article IV, Working Conditions

Section 5.

The Employer may require employees to initial Employer policy and rules to verify that those policies and rules have been read and that the employees are familiar with their contents. Employer policies and rules which employees are required to initial shall be posted in each store and furnished to the Union upon request.

Section 11(a).

No employee shall be disciplined or discharged without just cause.

Article V, Seniority

Section 8.

Seniority shall be terminated or broken for the following reasons:

a. Voluntary quit;

b. Discharge for cause;

c. Layoff exceeding twelve (12) consecutive months;

d. Failure to report for work within three (3) days after receipt of a written recall notice;

e. Reduction from full-time to part-time status for more than one (1) year (but such an employee's part-time seniority shall be measured from his or her last date of hire).

Article XV, Grievance Procedures

Section 1.

Should any dispute or grievance arise under this Agreement, it shall be settled in accordance with the procedure set forth in this Article, and, except as otherwise specifically provided in this Agreement, this procedure is the sole and exclusive method of disposing of such grievances.

Section 3.

The arbitrator's decision shall be issued within thirty (30) days after the dispute or grievance is submitted to the arbitrator and shall be final and binding upon the Employer, the Union, and the employee or employees involved. The expenses of the arbitrator shall be borne equally by the Employer and the Union.

Section 5.

In the event a grievance goes to arbitration, this Agreement, including any Supplements or Addenda, shall be the basis on which the arbitrator's decision is rendered, and in reaching his or her decision, the arbitrator shall have no authority to amend, modify, or in any way change its terms.

EMPLOYEE HANDBOOK

Work Rules/Prohibited Acts Policy

Summary

The orderly and efficient operation of the store requires that employees maintain proper standards of personal conduct at all times. Proper standards of conduct are necessary to protect the health and safety of all employees, to maintain uninterrupted production and to protect the Company's goodwill and property.

Giant Eagle sets forth its established work rules which, together with all other proper standards of conduct, employees are required to obey."

II. The following is a partial list of violations that may be cause for immediate termination.

13. Gross insubordination or refusal to follow supervisor's orders.

EMPLOYEE HANDBOOK

Sexual Harassment Policy

Summary

Giant Eagle will promote a workplace that is free of sexual harassment.

Giant Eagle is committed to providing a workplace free of sexual harassment, Sexual harassment of employees in the workplace or in other settings in which employees may find themselves in connection with their employment is unlawful and will not be tolerated. Further, any retaliation against an individual who has complained about sexual harassment or retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is similarly unlawful and will not be tolerated. To achieve our goal of providing a workplace free from sexual harassment, the conduct that is described in this policy is prohibited. If such conduct does occur, a procedure to investigate reported incidents has been established and communicated to employees.

Giant Eagle takes allegations of sexual harassment seriously and we will respond promptly to complaints of sexual harassment. Where it is determined that such inappropriate conduct has occurred, we will act promptly to eliminate the conduct and impose such corrective action as is necessary including disciplinary action up to, and including, termination.

Definition of Sexual Harassment

Sexual harassment includes unwelcome sexual advances, requests for sexual favors and verbal or physical conduct of a sexual nature when:

- Submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or a basis for employment decisions.
- Such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.
- Any unwelcome E-mail communication or viewing, downloading or transmitting sexually explicit or offensive material from the Internet also constitutes creating a hostile work environment.

Under these definitions, direct or implied requests by a supervisor for sexual favors in exchange for actual or promised job benefits such as favorable reviews, salary increases, promotions, increased benefits or continued employment constitutes sexual harassment.

The legal definition of sexual harassment is broad. In addition to the above examples, other sexually oriented conduct that is unwelcome and has the effect of creating a work place environment that is hostile, offensive, intimidating or humiliating to male or female workers, whether it is intended or not, may

also constitute sexual harassment. While it is not possible to list all examples of sexual harassment, the following list contains additional types of conduct, which, depending upon the totality of the circumstances including the severity of the conduct and its pervasiveness may constitute sexual harassment:

- Unwelcome sexual advances – whether they involve physical touching or not;
- Sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life, commenting on an individual's body, commenting about an individual's sexual activity, deficiencies or prowess;
- Displaying sexually suggestive objects, pictures, cartoons, etc.;
- Unwelcome leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments; and
- Inquiries into one's sexual experiences.

Retaliation against an individual who has complained about sexual harassment and retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is unlawful and will not be tolerated.

Complaints of Sexual Harassment

If any employee believes that he or she has been subjected to sexual harassment, the employee has the right to file a complaint with our organization. This

may be done in writing, or orally, by contacting Ray Huber, Vice President, Human Resources or anyone on the list below:

Giant Eagle Retail – COD: Jean Colarik, Director, Human Resources; Larane Hulsman, Manager, Employee Relations; Ray Huber, VP Human Resources.

Sexual Harassment Investigation

When we receive the complaint, we will promptly investigate it in a fair and expeditious manner. The Human Resource Department will conduct all investigations of sexual harassment The *investigation will be conducted to maintain confidentiality to the extent practicable.* Our investigation will include a private interview with the person filing the complaint and with witnesses. We will also interview the person alleged to have committed sexual harassment. When we have completed our investigation, we will, to the extent appropriate, inform the person filing the complaint and the person alleged to have committed the conduct of the results of the investigation. It may be necessary to suspend an employee pending investigation.

If it is determined that inappropriate conduct has occurred, we will act promptly to eliminate the offending conduct and where it is appropriate we will also impose disciplinary action.

Giant Eagle will not tolerate job-related sexual harassment. Furthermore, any form of sexual harassment must not be sanctioned or accepted by any employee of the Company. All employees are responsible for maintaining a workplace free from sexual harassment. Managers, supervisors and employees are obligated to promptly report incidents of sexual harassment to Ray Huber, Vice President Human Resources or your Human Resource Manager.

Disciplinary Action

If it is determined that inappropriate conduct has been committed by one of our employees, we will take such action as is appropriate. Such action may range from counseling to termination from employment and may include such other forms of disciplinary action as we deem appropriate. This policy sets forth our goal of promoting a workplace that is free of sexual harassment. The policy is not designed or intended to limit our authority to discipline or take remedial action for workplace conduct, which we deem unacceptable, regardless of whether that conduct satisfies the definition of sexual harassment. (emphasis supplied).

APPENDIX F

ARBITRATION DECISION

IN THE MATTER OF
ARBITRATION BETWEEN:

Giant Eagle, Inc.	)	**FMCS #05-51392**
and	)	**Grievant:**
United Food and Commercial Workers Union Local 880	)	**Matthew A. Craig**

APPEARANCES:

For the Company:	***For the Union:***
Mark Webber, Esq.	Todd M. Smith, Esq.
Duvin, Cahn & Hutton	Schwarzwald & McNair
Erieview Tower, 20th Floor	616 Penton Media Building
1301 E. Ninth Street	1300 E. Ninth Street
Cleveland, Ohio 44114	Cleveland, OH 44114

ARBITRATOR:

Patricia Thomas Bittel

Issue: Termination for Insubordination

BACKGROUND

This case was heard March 25, 2005 in Cleveland, Ohio before the neutral arbitrator, Patricia Thomas Bittel, mutually selected by the parties in accordance with Article XV Section 1, Step 4 of the collective bargaining agreement.

Grievant Matthew Craig was hired as a part-time grocery clerk on July 27, 2003. During the latter part of March 2004, he was assigned as manager in charge at his store. On June 25, 2004, this assignment was revoked. On June 30, 2004 Grievant voluntarily went to corporate headquarters to meet the Manager of Employee Relations Larane Hulsman. On July 1 he was terminated for violation of the rules against gross discourtesy and insubordination.

A grievance was filed protesting the termination and raising other claims. A supplemental grievance was filed on July 22 adding to the claims. At a Step Three meeting, the grievance was modified and some of the claims were settled. The case then proceeded to arbitration. The parties stipulated the matter is properly before the Arbitrator for resolution and jointly submitted the following issue: *Was the Grievant, Matthew Craig, discharged on June 30, 2004 for cause under the collective bargaining agreement? If not, what shall be the remedy?*[1] Because the stipulated issue only deals with the termination itself, other issues raised in the grievances are deemed dropped or settled.

DISCUSSION

Human Resources Manager at the Middleburg Heights store, Jackie Lenson, testified that Grievant

[1] Article V §8 provides for termination of seniority where there is discharge for cause.

Matthew Craig was employed at the store when she came in June of 2004. She said that when she arrived she received a few written complaints from the prior HR Manager about Craig, then received three to four additional complaints about his conduct toward other employees. According to Lenson, the complaints claimed he was arrogant, demanding and rude. She said there are three other managers in charge, but she did not receive any complaint about them.

She said she also received a complaint from a 17 year old minor who was offended when Grievant approached him and asked if he liked girls. The minor stated he answered "yes," but later decided that he was offended and uncomfortable, and made a written complaint. Lenson said she discussed the matter with the store manager and told Grievant about it. She recalled Grievant's response was that the complaint was ridiculous and he was only joking around. She said she explained to him that it was considered a complaint of sexual harassment and needed to be investigated. She also told him of complaints that his treatment of employees was unacceptably rude and arrogant.

She said he first denied that he had been rude and arrogant, then said it did not matter if he was, because he was there to tell employees what needed to be done. She said she explained that his perception was wrong, that you cannot be rude and arrogant with employees. Craig was removed as a manager in charge, she said. There was no resulting loss of pay or

hours, she related; because it had not been a promotion.

She said a few days later Grievant came into her office uninvited and demanded a Union steward. She recalled that he opened the conversation stating "Call the Union steward up here." Those were his first words, she said.

She said he slammed down a pile of papers and a handbook on her desk and told her she needed to read the law because she was accusing him of sexual harassment. Lenson said she explained it was a complaint that had to be investigated. She said Grievant began demanding the reasons for his 'demotion' in writing, as well as a list of people who had complained. Lenson said she told Grievant he had no right to talk to her in that fashion. She stated he next demanded supervisors' names, addresses and phone numbers, his personnel file and all the complaints that other employees had lodged. She recalled that he wanted her to stop what she was doing and meet his requests. She said she could not provide access to his personnel file of her own accord, but called and was advised that his store file was not his personnel file, and arrangements could be made for him to see the personnel file. She described him as rude, and said the Union Steward told her Grievant had no right to be demanding in the way he was.

Lenson recalled that the grocery manager reported to her that he was introducing himself to employees, and when he introduced himself to Grievant, he asked

how he was. He said Grievant responded "Not very well," and went on to say he was being accused of sexual harassment. Lenson explained that this was inappropriate because sexual harassment complaints were confidential and this had already been explained to Grievant.

Larane Hulsman testified that she has been with Giant Eagle for 32 years and has worked as the Manager of Employee Relations for about one year She said Jackie Lenson reported to her and advised her of Grievant's breach of confidentiality about the sexual harassment complaint. Hulsman recalled telling Lenson she would like to talk with Grievant and explain to him what the procedures are in an investigation and why it is important that management conduct the investigation. She said she was concerned that it be confidential and that he was discussing it out on the floor. She told Lenson to tell Grievant she was available at 3:00 p.m. if he would like to come in.

The meeting was not mandated, Hulsman said, but Grievant was on the clock at the time. She said Grievant spoke first and described the complaint, stating he did not believe it was sexual harassment. She said he told her about an incident with another employee in the back room who asked him to remove a pallet. He mentioned a dairy manager, then stated that Lenson, the employee who had complained and Store Manager Dennis Hummel should all be removed from the store. Hulsman explained that Hummel had been with the Company for about 30

years and Lenson had been with the Company 15 to 20 years.

After he was done, Hulsman said she began by discussing the situation with the minor. She said she explained that this situation did not constitute sexual harassment, but it was inappropriate to have that type of conversation and in addition, she pointed out it was especially sensitive due to the fact that the other employee was a minor. She said Grievant disagreed with her, and when she explained that his comment had a sexual inference, he held up his hand and smirked, stating "for the sake of argument, I'll agree with you, but you are wrong." Hulsman said she explained that she was not arguing, but he needed to understand the Company position that those types of comments are inappropriate.

She said Grievant continued to disagree, stating "I did not come down here to have you recite Company policy." Then he slammed a book closed and announced that the meeting was over. Hulsman said she responded that she was not reciting Company policy, and she had listened to him, and would like him to listen to her. She said she told him the meeting was not over because she had not concluded her responses. She explained that the meeting would not be over until she said it was, and had had an opportunity to respond. She further stated that she told Grievant if you leave, it's insubordination and a terminable offense." She related that he looked at her for three to five seconds, then went to the door and continued on out. She flatly denied giving him

permission to leave, stating "Nothing I said could be construed that way?

She said after he left, she went into her manager's office and related what had happened. Next, she called the business agent for Local 880, Sam Barber, and advised him of the situation. Then she made a written account of the events.

She described a subsequent meeting where Grievant said he would not go forward with the meeting so long as Lenson was there. She said she had never been involved in a meeting where someone said they would not go forward with a management representative present. She related that the Company ultimately complied with Grievant's request.

Grievant testified that after his hire, he worked 15 to 20 hours a week while attending law school, and received several merit increases. He further stated he has received awards for his work. He asserted that Store Manager Dennis Hummel told him he liked how he was performing his job. He claimed to have received no discipline for attendance, work performance, violation of rules or any other matter. The Union argued that his work was praised and appreciated. The facts establish that Grievant's work was quite good, at least until the point when he became a manager in charge.

Grievant explained that if employees did not follow his directions as manager in charge, he would try to "coerce" them to do so. He said if they refused, he would progressively get more direct with the final

option being to send an employee home. He claimed there was only one occasion when he had to send an employee home. He gave examples of trying to coerce employees when they balked at his direction. In one of his examples, an employee complained that she could not get to her stuff because a pallet needed to be moved and she asked him to move it. He said he responded that she should move it herself because he did not have time, then he pointed out there was plenty of room for her to get past it. Despite his articulated lack of time, he then went to get a camera to take pictures of the area to substantiate his viewpoint. Rather than help an employee, he entered into a conflict with her, and rather than take the time to move the pallet, he took pictures of it.

He recalled meeting with Lenson and Hummel, and learning about the complaints made against him. He said he asked what incidents she was referring to in terms of the complaints, but her response was vague and she gave no specifics.

He said he wrote a list of things he wanted from Lenson, stating he asked for his personnel file, Lenson's supervisor's contact information, information about the reason for his 'demotion,' and the substance of the complaints against him. He denied slamming anything, stating he used a tossing motion. He admitted telling Lenson she needed to read the court cases and administrative regulations he had collected, because his actions did not constitute sexual harassment under the law. He related that she just pushed them aside and did not seem to care. He recalled she

said she needed to talk to a supervisor about the personnel file. Grievant said he asked if she could call now, stating he asked, but did not demand. He said he was ultimately denied the documents.

He acknowledged that Lenson told him she did not like the way he was talking to her, but would look into his requests and contact her supervisor. He admitted that Hummel told him he did not appreciate how he spoke to Lenson and did not like his attitude at the meeting. He conceded that Hummel thought his conduct was unwarranted. These facts establish that more likely than not, Grievant was disrespectful and overbearing towards Lenson and did not listen to or hear Lenson's comments. His version of events demonstrates that Grievant was not receptive to managerial guidance and was either unwilling or unable to acknowledge management's perspective.

He recalled that on June 30 he was called into the office and offered an opportunity to speak with Larane Hulsman. He said he was told he would be paid mileage plus his hourly rate and travel time. He said he accepted. He said when he met with Hulsman, he told her what had happened. He said he explained that he thought the sexual harassment allegation was ludicrous. He recalled she responded that while it was not sexual harassment, but was improper, and because a minor was involved, "We needed to be more careful."

She asserted his comment had sexual undertones, he said, stating he disagreed with her about

that and meant nothing sexual by the remark. He said this point was debated for awhile, then he told Hulsman he came to talk about how the investigation was going, but she was just telling him policy. He said he got up to go, but she told him not to walk out because she was not done. He recalled that she warned him that leaving would be insubordination, a terminable offense. He said he stopped and started arguing the whole thing over again, stating "What's the point of arguing, we aren't getting anywhere? Finally, after more arguing, she became flustered, he claimed, and told him "Fine, go, just go." He said he turned and walked out the door.

Grievant said his meeting with Hulsman was voluntary and he also acknowledged that he told Hulsman that Lenson and the minor should be removed from the store. He did not recall saying that Hummel should. He felt the minor employee should be disciplined for making a false accusation, though he acknowledged that people have a right to file a complaint if they feel harassed. In this instance, Grievant took it on himself to make unsolicited recommendations about personnel placement despite the fact that he was not a manager and had no responsibility for human resources.

Grievant said he was not pleased with the extent of the investigation. He admitted Hulsman let him complete everything he had to say before she began her response. He acknowledged closing his binder and saying that the meeting was over. Here again, he took it upon himself to try to control the meeting and

usurp Hulsman's role as the manager. Significantly, he refused this opportunity to listen and learn.

Union Representative Sam Barber testified to cases he perceived as disparate treatment. However, on cross examination he admitted to distinctions in that the cases he cited involved failure to follow directions, not willful insubordination. He also acknowledged that Human Resources does have the authority to fire someone. He recalled receiving a call from Hulsman stating an employee from the Middleburg Heights store announced a meeting was over and left, despite a warning that this would constitute insubordination, a terminable offense.

The concept of insubordination has been refined by arbitrators over the course of many years, and the burden rests on the Employer to establish the elements of insubordination.

> Generally, employees must follow orders given by a superior, although they may later challenge the propriety of the order through the established grievance procedure. As one arbitrator put it: '[T]o permit employees to willfully disregard a direct order would result in chaos.' Insubordination is the refusal by an employee to work or obey an order given by the employee's superior. In most instances, any employee who refuses to work or obey now (and grieve later) is considered 'insubordinate.' This basic definition, however, is subject to at least six qualifications.

First, an employee's refusal to work or obey must be knowing, willful, and deliberate. Mere negligence in performing one's duties is not insubordination.

Second, the order must be both explicit and clearly given, so that the employee understands both its meaning and its intent as a command.

Third, the order given must be both reasonable and work related. The employee need not be on duty to be found insubordinate, provided the employee's conduct injuriously affects his employer's business.

Fourth, the order must have been given by someone with appropriate authority, and the employee must have understood that person to possess that authority.

Fifth, the employee must be made aware of the consequences of failing to perform the work or follow the directive. For example, an employer improperly suspended an employee for insubordination because the employee took 2 days off to be with his child for her surgery. The employer denied his request for leave, offered to allow the employee to use vacation time, but failed to tell him he would be disciplined if he took the days off.

Finally, if practical, the employee must be given or have time to correct his purportedly insubordinate behavior. For instance, a discharge for insubordination was overturned

> where an employee requested a different assignment after he was told at the end of his shift that the next day he would be assigned to inventory duty. His supervisor refused the request, commented on his poor attitude, and discharged him. The arbitrator found the employee had not been given an opportunity to report the next day and perform the job assignment, nor the opportunity for sober reflection.[2]

Arbitrators have sustained insubordination charges for refusing to attend or interrupting a Company meeting.[3] The Union argues that the quantum of proof should be clear and convincing evidence. However, the prevalent view at labor arbitration is that the appropriate standard is preponderance of the evidence. The higher standard is not generally used unless criminal or stigmatizing conduct has been alleged, and even then, many arbitrators stick to preponderance as the appropriate standard.[4]

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[2] Brand, Discipline and Discharge, (BNA Books, 1998) 155-156

[3] Ermanco, Inc., 101 LA 269 (Ellman, 1993). *See also*, Valley Hosp. Ass'n, 97 LA 661 (Calhoun, 1991); Scovill, Inc., 84 LA 201 (Storey, 1985); American Can Co., 57 LA 1063 (Kerrison, 1971).

[4] [M]ost arbitrators apply the 'preponderance of the evidence' standard to ordinary discipline and discharge cases "(Elkouri & Elkouri, How Arbitration Works, 6th Ed. (BNA Books, 2003) 950. An example of stigmatizing conduct would be child abuse by a teacher. Grievant's conduct was neither criminal nor stigmatizing.

Hulsman's version of events on June 30 cannot be reconciled with Grievant's. Either she gave him permission to leave or he left despite her instruction to stay. The Company's ability to prove the elements of insubordination rests on whether Grievant was given permission to leave. Hence, relative credibility must be examined.

The Union has argued that Grievant, as a disgruntled employee or Union member, is not inherently any less credible than management.[5] By contrast, the Company maintains that Grievant's evident interest in the outcome of the case constitutes bias, making him the less credible witness. Before relying on status as an indicator of reliability, the Arbitrator prefers to evaluate content of testimony as an indicator of reliability.

Grievant had not been employed for an entire year at the time of the events here concerned. When advised that other employees had complained of his rude and arrogant behavior, he first denied such conduct, then argued that even if he had been rude it did not matter. These two responses are not harmonious.

Grievant asserted that he did not know that Hulsman had authority to fire him, but thought the only person who could fire him was the store manager. He explained there was no reason for him to

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[5] Union Brief p. 13.

think that Human Resources could fire him because he never took direction from them. This argument is a red herring. Hulsman, as Manager of Employee Relations, would naturally be involved in termination decisions. Even if Grievant did not understand this apparent reality, he knew or should have known that unacceptable conduct would be reported and acted upon by others. Any confusion on this point was certainly clarified when Hulsman advised Grievant that departure would constitute insubordination, a terminable offense. At that point, her authority to terminate Grievant had been plainly expressed. It follows that Grievant's claimed ignorance of her authority is incredible on its face and erodes the reliability of his other testimony.

The Union argues that Hulsman's testimony was flawed by inconsistency. It notes she said she claimed to have initiated the meeting because of confidentiality concerns, though no mention is made of this in her notes. However, Hulsman did not get to finish making her points, so she did not reach the confidentiality issue and had no note to make regarding any discussion of confidentiality. The Union also points out that she said she did not check to see whether Grievant was scheduled to work the next day, though her notes indicate she did. This point does not involve the exchange between Grievant and Hulsman. Such a minor inconsistency is not sufficient to demonstrate that Hulsman's recollection of Grievant's insubordinate departure was unreliable.

It is telling that Hulsman immediately reported the insubordinate departure both to her superior and the Union. This reaction is consistent with the shocking impact of Grievant's conduct, and with Hulsman's surprise that Grievant would leave after her explicit warning. There is absolutely no logical or credible explanation for her reaction unless Grievant did walk out without permission.

Hulsman was a high ranking administrator in the Company's organization and a professional in dealing with issues of employee conduct. She had no axe to grind with Grievant and no preexisting bias, having only just met him. She was trying to make him understand why his comment to the minor was inappropriate. It contravenes logic for her to tell him to go when she had not yet been able to get any acknowledgment from Grievant that he understood.

If Hulsman had given Grievant permission to leave as he claims, she would have no reason to report him as insubordinate. Indeed, it would be completely illogical and nonsensical to tell an employee to leave, then report him as having been insubordinate for doing so. Taken together, these facts and considerations support the conclusion that Hulsman's testimony is more reliable than Grievant's, and should be credited.

The Union argues that Grievant did not refuse to perform work. However, he was on the clock and met with Hulsman at the Company's expense. His work at that point was to meet with Hulsman, explain his

concerns and come to a better understanding of the Company's approach to employee complaints. The business purpose was to improve his understanding of complaint handling and investigation as well as his sense of workplace propriety. Grievant refused to perform this work.

By leaving despite an explicit instruction, Grievant knowingly, willfully and deliberately refused to obey Hulsman's instruction. Her order was explicit and clear so that Grievant understood he was being instructed to stay. The order was reasonable and work related. Hulsman was trying to explain why Grievant's conduct was of concern, and he had given no indication of understanding. The order was given by someone with appropriate authority, as Hulsman was an administrator in Human Resources. She made it clear that if he left he would be committing a terminable offense. Despite the clarity of the warning, he consciously put his employment at risk. Hulsman's warning gave Grievant an adequate opportunity to correct his insubordinate behavior. It was his decision to walk out the door after her warning. The evidence has established all the elements of insubordination and satisfies the Employees burden of proof.

The Union maintains that insubordination was treated casually at Giant Eagle, and Grievant was the victim of disparate treatment. However, many of the examples offered to support this allegation were of employees failing or refusing to follow Grievant's orders as manager in charge. These examples are

inapposite because they do not involve refusals to follow orders from a manager or supervisor. There is no insubordination unless the order comes from a superior. Grievant was not his co-workers' supervisor when they balked at his direction. The other examples offered were of failures to follow instructions, and did not entail the willful, deliberate defiance of managerial authority evident in Grievant's case. The evidence therefore fails to demonstrate disparate treatment.

More likely than not, Grievant left Hulsman's office after being told that the meeting was not over and that departure would constitute insubordination, a termination offense. His attitude at the time was not one of listening to Hulsman, or properly respecting her. Rather, he accused her of simply reiterating policy to him and described the meeting as useless when she was explaining the Company's need to investigate complaints.

The concept of just cause functions to protect the employment relationship where progressive discipline can be instrumental in helping the employee to assimilate and meet the employer's reasonable expectations. The evidence in this case gives no indication whatsoever that Grievant could or would benefit from progressive discipline. He has not heeded any warning given by either Lenson or Hulsman. He has not so much as acknowledged any suggestion that he modify his behavior. At every turn he has turned a deaf ear to any critique of his conduct on the job. The

Arbitrator is persuaded that progressive discipline would be of no use in Grievant's case.

The Union asserts Grievant's due process rights were violated because there was no full and fair investigation. However, the insubordination here concerned was directed at the Manager of Employee Relations, that is, the person with responsibility for reviewing termination decisions. In such a situation, there is no need for further investigation and review.[6] Even so, Hulsman immediately apprised her superior of the situation.

The Union strongly argues that discharge is too severe a penalty in this case because there were no threats, abusive language, violence, refusal to work or other observers. Certainly, the penalty in a just cause analysis must be proportionate to the seriousness of the offense. Direct insubordination to a manager is extremely serious when it utterly prevents the Company from carrying on its business. In this case, when Grievant walked out, Hulsman was completely blocked from finishing her business of counseling him. His departure was in the face of a specific warning that discharge would be the likely consequence. Hence, Grievant's departure was an act of defiance and a direct challenge to Hulsman's authority. As such, it was very serious in nature. Grievant's record of employment, though initially good, is not long enough to constitute a mitigating circumstance.

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[6] Ermanco, Inc., *supra* n.3.

The Union has vigorously mounted a highly competent and thorough challenge to Grievant's termination. The case, however, turns on a credibility determination. The Arbitrator has carefully observed witness demeanor at hearing and evaluated testimony, and finds Hulsman to be the more credible witness.

AWARD

Grievant Matthew Craig was discharged for just cause under the collective bargaining agreement. The grievances are denied.

Respectfully Submitted,

/s/ Patricia T. Bittel

Patricia Thomas Bittel,

Arbitrator

Dated: June 22, 2005

(4)

No. 07-534

In The

FILED
DEC 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

MATTHEW A. CRAIG,

Petitioner

v.

JOHN BRIGADIER, SUSAN M. BRIGADIER, DAVID L. BRIGADIER, JACQUELYN F. LENSON, RISER FOODS COMPANY, d/b/a GIANT EAGLE, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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ARGUMENT

I. RESPONDENTS OPPOSE THE PETITION THROUGH UNSUSTAINABLE FACTUAL CONCLUSIONS AND MISCHARACTERIZATIONS AS TO THE NATURE OF THE WITHIN ACTION.

In opposing Petitioner Matthew A. Craig's (hereinafter "Craig") *Petition for Writ of Certiorari* (hereinafter "*Petition*"), Respondents both materially misstate the facts of this case on several occasions in an apparent gamble that this Court will not take an independent review of the facts and impermissibly attempt to misdirect Craig's claims and the arguments he has made throughout this case. Respondents first attempt to misdirect this Court in asserting that Craig premises his defamation and tortious interference claims on an internal sexual harassment charge filed by Respondent John Brigadier. (Brief in Opp. at 1). However, nothing in the *Complaint*, *First Amended Complaint* (hereinafter "FAC"), nor any of the other documents Craig has submitted in this case indicates that he premises his claims on an internal sexual harassment charge filed by Respondent John Brigadier.[1]

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[1] Respondents apparently rely upon this misstatement to support their erroneous conclusion that the grievances Craig initially lodged pursuant to a CBA grievance procedure following his termination are the same claims he presents in his FAC. (Brief in Opp. at 7-8, 14). Respondents' position that the *Complaint* must contain the same claims that Craig made pursuant to a grievance procedure of a CBA since Craig filed his *Complaint* around the same time that he filed his grievance not only lacks logic, but any review of the grievances Craig made pursuant to a CBA

Respondents next attempt to misdirect this Court in asserting that Craig brought the instant action to challenge the outcome of an arbitration decision relating to a collective-bargaining agreement ("CBA"). (Brief in Opp. at 3, 11). As Respondents' own admissions show, though, Craig filed his *Complaint* on July 20, 2004, whereas the arbitration decision Respondents refer to did not come into existence until nearly a year later, on June 22, 2005. (Brief in Opp. at 8). In fact, Respondents admit that Respondent Riser did not first deny Craig's grievances under the relevant CBA until July 27, 2004, a week *after* Craig had filed suit. (Brief in Opp. at 8). Accordingly, as Craig previously indicated in his *Petition*, one could not reasonably construe the instant lawsuit as an attempt to challenge the arbitration decision referred to by Respondents.[2]

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grievance procedure will reveal that the claims Craig asserts in the case *sub judice* are legally and factually distinct from the CBA grievances.

[2] The fact that the arbitration proceeding was completely separate and irrelevant to Craig's commencement of the instant litigation for state law torts answers Respondents complaint that Craig has "artfully avoided informing this Court of the outcome of the arbitration award". (Brief in Opp. at 21).

II. RESPONDENTS FAIL TO RECOGNIZE THE LESSONS OF *LINGLE* AND FAIL TO IDENTIFY CBA TERMS THAT REQUIRE INTERPRETATION.

Respondents' accusation that Craig misstates the law at page 13 of his *Petition* with regard to preemption under section 301 of the Labor-Management Relations Act (hereinafter "LMRA") is unjustified. (Brief in Opp. at 13 n.6). This Court has specifically said that:

> [E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes.

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 409-410 (1988). Moreover, this Court summarized its holding in *Lingle* as follows: "an application of state law is pre-empted by § 301 of the Labor Management Relations Act of 1947 *only* if such application requires the interpretation of a collective-bargaining agreement". *Id.* at 413 (emphasis added).

Respondents' next argument that each of Craig's claims requires interpretation of CBA terms is likewise unjustified. In so arguing, Respondents fail to identify a single CBA term that requires interpretation. Instead, Respondents decline to heed this Court's instruction in *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396-97 (1987) and attempt to re-characterize Craig's claims as claims "for wrongful discharge and demotion". (Brief in Opp. at 14).

Respondents then summarily contend that the claims "require interpretation of the Agreement" because "the Court must review the standards for discharge under the CBA". (Brief in Opp. at 14-15). Even if Respondents could properly re-characterize Craig's claims as claims for wrongful discharge, a practice this Court admonished against in *Caterpillar*, 482 U.S. at 396-97, it does not follow that such claims would require interpretation of a CBA. As this Court has instructed:

> [T]he mere fact that a broad contractual protection against discriminatory or retaliatory discharge may provide a remedy for conduct that coincidentally violates state-law does not make the existence or the contours of the state law violation dependent upon the terms of the private contract. For even if an arbitrator should conclude that the contract does not prohibit a particular discriminatory or retaliatory discharge, that conclusion might or might not be consistent with a proper interpretation of state law. In the typical case a state tribunal could resolve either a discriminatory or retaliatory discharge claim without interpreting the "just cause" language of a collective-bargaining agreement.

Lingle, 486 U.S. at 412-13.

Apparently realizing that this Court may not fall for their re-characterizations, Respondents then argue that the elements of Craig's defamation and tortious interference claims require interpretation of a CBA for their proof. (Brief in Opp. at 15, 19-20). However, the elements of the defamation claims in the United States Courts of Appeals cases Craig cited in his *Petition* are virtually identical to the

elements of the defamation claims in the case *sub judice*.[3] Notwithstanding the virtually identical elements, the Fourth,[4] Eighth,[5] and Ninth[6] Circuits have most recently held that proof of the defamation claims in the cases before them *did not* require interpretation of a CBA while the Second[7] and Sixth[8] circuits have most recently held that proof of the defamation claims *did* require interpretation of a CBA.[9] Thus, a conflict exists among the circuits.[10]

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[3] See, for example, the elements of defamation claims for the states of California, Iowa, Maryland, Michigan, New York, and Ohio located in the Appendix.

[4] *Dashields v. Robertson*, 2000 U.S. App. LEXIS 9533 (4th Cir. 2000) (defamation claim under Maryland law – see Appendix).

[5] *Graham v. Contract Transp., Inc.*, 220 F.3d 910 (8th Cir. 2000) (defamation claim under Iowa law – see Appendix).

[6] *Lopez v. Fox Television Animation, Inc.*, 76 Fed. Appx. 769 (9th Cir. 2003) (defamation claim under California law – see Appendix).

[7] *Campbell v. Kane*, 144 Fed. Appx. 127 (2d Cir. 2005) (defamation claim under New York law – see Appendix).

[8] *Potts v. Wilson*, 54 Fed. Appx. 190 (6th Cir. 2002) (defamation claim under Ohio law); *DeCoe v. Gen. Motors Corp.*, 32 F.3d 212 (6th Cir. 1994) (defamation claim under Michigan law).

[9] Later in their Brief, Respondents change their argument and, instead, argue that the divergence between the Courts of Appeals' decisions regarding LMRA preemption of defamation claims actually results from differences in the facts of the cases rather than the element composition of the claims. (Brief in Opp. at 19). However, Respondents completely fail to explain how the facts materially differed among the cases and how those facts resulted in differing outcomes. Furthermore, this Court has

In arguing that a court must "interpret [Riser's] right under the CBA to implement the sexual harassment policy, the reasonableness of that policy, and the Defendants' application of that policy to determine whether any of the alleged reports were 'unprivileged' and at 'fault'" in order for Craig to prove his defamation claims (Brief in Opp. at 15), Respondents not only, again, mischaracterize Craig's claims as have anything to do with Respondent Riser's sexual harassment policy or reports made pursuant to that policy, but Respondents misconstrue proof of fault as requiring proof of the non-existence of a CBA defense. Respondents cannot evade this Court's pronouncement that defenses based upon a CBA are insufficient to give rise to removal jurisdiction. *Caterpillar*, 482 U.S. at 398-99. Here, Craig need only prove fault as defined by Ohio tort law. Had no CBA existed, Craig could readily prove his defamation claims as they presently rest on the face of his FAC. It is nonsensical that Craig cannot prove the same claims where a CBA happens to exist.[11]

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previously rejected Respondents' argument, saying "it is the legal character of a claim [rather than the facts underlying the claim]...that decides whether a state cause of action may go forward". *Livadas v. Bradshaw*, 512 U.S. 107, 123-24 (1994).

[10] *See also Livadas v. Bradshaw*, 512 U.S. 107, 124 n.18 (1994) (recognizing a conflict among the circuits with respect to LMRA preemption analysis); *Schacht v. Caterpillar, Inc.*, 503 U.S. 926, 926-27 (1992) (White, J., dissenting) (recognizing conflict).

[11] As to the "unprivileged" aspect of a defamation claim, Ohio courts do not actually impose upon a plaintiff the initial burden of showing that a defendant made a defamatory statement without privilege. *See, e.g.,*

Although the courts below did not decide the matter, Respondents misstate Ohio law in asserting that a tortious interference with contract/employment claim requires a showing that a party breached the underlying contract. Craig, indeed, did not cite *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 650 N.E.2d 863 (1995) in his *Petition* but, instead, cited the Ohio Supreme Court's later decision of *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 707 N.E.2d 853 (1999) in setting forth the required elements for a tortious interference claim. (Petition

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Kanjuka v. MetroHealth Med. Ctr., 151 Ohio App.3d 183, 191, 783 N.E.2d 920 (8th Dist. 2002); *Denlinger v. City of Columbus*, No. 00AP-315, 2000 Ohio App. LEXIS 5679, *27-28 (10th Dist. Dec. 7, 2000). Rather, courts hold that the mere assertion that a defamatory statement was unprivileged is sufficient unless and until the defendant demonstrates applicability of the affirmative defense of privilege. *Denlinger*, 2000 Ohio App. LEXIS 5679 at *27-28. Furthermore, Ohio courts have consistently held that an allegation of malice in a complaint precludes a finding of privilege when determining the sufficiency of a stated defamation claim. *See, e.g., Denlinger*, 2000 Ohio App. LEXIS 5679 at *27-28; *Bell v. Horton*, 107 Ohio App.3d 824, 829-30, 669 N.E.2d 546 (4th Dist. 1995). Craig has repeatedly asserted that Respondents published the defamatory statements with malice. (See Petition at 3-5, Appendix 17-29). Moreover, in the present case, the statements complained-of are clearly of the type to subject Craig to ridicule or to injuriously affect his profession, thus constituting *defamation per se*. *Elwert v. Pilot Life Ins. Co.*, 77 Ohio App.3d 529, 540, 602 N.E.2d 1219 (1st Dist. 1991). Defamation per se presumes malice. *Id.*; *Kanjuka*, 151 Ohio App.3d at 192.

at 19-20).[12] The Ohio Supreme Court's later decision, decisions by various intermediate Ohio courts of appeals, and decisions by various federal courts interpreting Ohio law, including the Sixth Circuit Court of Appeals, confirm that breach is not a required showing to prove a tortious interference claim in Ohio. *See, e.g., Fred Siegal Co.,* 85 Ohio St.3d at 176; *Doyle v. Fairfield Mach. Co., Inc.,* 120 Ohio App.3d 192, 216-17, 697 N.E.2d 667 (11th Dist. 1997); *Brookeside Ambulance, Inc. v. Walker Ambulance Serv.,* 112 Ohio App.3d 150, 155-56, 678 N.E.2d 248 (6th Dist. 1996); *Lovely v. Aubrey*, 188 F.3d 508, 1999 U.S. App. LEXIS 21055, *15 (6th Cir. 1999) ("under Ohio law...breach of the underlying contract is not an essential element of [a] tortious interference claim"); *Petrovski v. Fed. Express Corp.*, 240 F. Supp. 2d 685, 689-91 (N.D. Ohio 2002) (the plaintiff need only show that the wrongdoer *intended* to cause contract breach or procure the termination of an employment relationship).[13] Respondents' argument that Craig's tortious

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[12] Respondents' assertion that the *Kenty* court established the claim for tortious interference in Ohio is erroneous. Ohio courts have long recognized the claim of tortious interference with contract. One of the most widely-cited authorities for tortious interference claims in Ohio is *Juhasz v. Quik Shops, Inc.*, 55 Ohio App.2d 51, 379 N.E.2d 235 (9th Dist. 1977). Ohio appellate courts continue to follow *Juhasz*, and the identical definition of tortious interference it promulgated, when confronted with tortious interference claims. *See, e.g., Fuller & Assocs. v. Heil Windermere Moving & Storage, Inc.*, 2005-Ohio-2599, ¶28 (5th Dist. 2005); *Costaras v. Dunnerstick*, 2004-Ohio-6266, ¶¶8-9 (9th Dist. 2004).

[13] The present case is not unlike *Dryden, supra*, where the Ohio Court of Appeals for the First District found that the LMRA did not preempt a tortious interference claim brought by a discharged employee against his

interference claims require a showing of contract breach is, therefore, without merit. [14]

III. RESPONDENTS AND THE COURTS BELOW MISS THE DISTINCTION BETWEEN AN ACTION BEING REMOVABLE TO FEDERAL COURT AND LMRA PREEMPTION OF THAT ACTION.

There, in fact, is a logical basis for the conclusion that the Sixth Circuit improperly approached the preemption issue in *DeCoe*. As this Court has said, irrespective of the complete preemption doctrine, the face of a plaintiff's complaint must indicate reliance on federal law in order for a defendant to remove the matter to federal court. *Caterpillar*, 482 U.S. at 398-99. On examination of DeCoe's complaint,

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coworkers. *Dryden,* 135 Ohio App.3d at 400-01. The *Dryden* court concluded that 1) the employee's right of noninterference by his coworkers was a creation of state law and not a CBA and 2) the employee's claim of tortious interference did not require interpretation of a CBA. *Id.*

[14] Although a plain reading of *Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895 (4th Cir. 1992) and subsequent interpretation of that decision appear to conflict on the issue of LMRA preemption of claims against persons not parties to a CBA, the Fourth Circuit's decision and the Sixth Circuit's decision in the case *sub judice* holding the LMRA to preempt defamation and tortious interference claims against persons not parties to a CBA nonetheless illuminate an important issue in the area of LMRA preemption that this Court has not previously decided.

though, none of the defamation, tortious interference, civil conspiracy, and intentional infliction of emotional distress claims relies upon the existence of a CBA. (See Appendix at 1-8). Although DeCoe described the defendants' tortious motive cognizable under state law as arising in the employment context and described the negative impact the torts had on his employment, the rights upon which DeCoe sought relief were those born of state law. Once the defendants in *DeCoe* removed the complaint to federal court, though, rather than determining removeability of DeCoe's complaint based upon the complaint itself, as this Court has directed, the courts in *DeCoe* engaged in an examination of various provisions of a CBA the *defendants* cited in defense of DeCoe's claims.

DeCoe exemplifies courts' often misapplication of the complete preemption doctrine to artificially create removal jurisdiction even when a complaint evidences no reliance upon federal law or CBA provisions and the action may otherwise proceed under state law. As this Court has indicated, even where the LMRA may ultimately preempt an action, it does not follow that the defendants may remove it to federal court. *Caterpillar*, 482 U.S. at 398-99. In the case *sub judice*, like the complaint in *DeCoe*, Craig's FAC contained no federal claims on its face. In fact, the Sixth Circuit acknowledged that Craig's FAC relied *exclusively* upon Ohio law. (Petition at Appendix 6). Consequently, pursuant to this Court's prior decisions, the federal courts below were without jurisdiction to consider the existence of LMRA preemption in the first instance. Therefore, this Court should grant certiorari to make plain the distinction between removeability and preemption the Sixth Circuit has

consistently failed to recognize.[15]

IV. THE DOCTRINE OF COLLATERAL ESTOPPEL ("ISSUE PRECLUSION") DOES NOT APPLY IN THIS CASE.

As Respondents apparently recognize, in order for the doctrine of collateral estoppel ("issue preclusion") to preclude the re-litigation of a particular issue, the party invoking the doctrine must establish the existence of four (4) elements. While failure to establish the existence of even one of the elements would render the doctrine inapplicable, Respondents have failed to establish any element. Most importantly, this Court and the Ohio Supreme Court have already determined that collateral estoppel does not apply to claims independent of a CBA, even where an arbitrator had previously decided the factual issues underlying those claims in resolving a dispute under a CBA. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737-45 (1981); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 287-92 (1984); *Youghiogheny & Ohio Coal Co. v. Oszust*, 23

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[15] This Court should note that of the 123 instances in which courts have cited *DeCoe*, as Respondents allege, only 17 involved courts located outside of the Sixth Circuit and, of those 17, several courts have questioned or otherwise criticized the decision. *See, e.g., Hirras v. Natl. R.R. Passenger Corp.*, 44 F.3d 278 (5th Cir. 1995) (noting the Sixth Circuit's failure to consider *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994)); *In Re Prudential Ins. Co. of Am. Sales Practices Litig.*, 924 F. Supp. 627, 643 n.13 (D.N.J. 1996) (declining to adopt).

Ohio St.3d 39, 41-45, 491 N.E.2d 298 (1986).[16]

Just as they have attempted to re-characterize Craig's claims so that they can argue that preemption bars his claims, Respondents now attempt to re-characterize Craig's claims so that they may argue that collateral estoppel bars his claims. However, Respondents' attempt at re-characterization fails here just as it fails with respect to arguing application of LMRA preemption. Accordingly, Craig respectfully requests this Court to grant his *Petition for Writ of Certiorari*.

Respectfully submitted,

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[16] Decisions such as *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) and *Minnick v. City of Middleburg Heights*, 2003-Ohio-5068 (8th Dist. 2003), involving state-law claims brought by plaintiffs *after* arbitrators had determined that employers had discharged the plaintiffs for "just cause" under a CBA, further indicate that claims premised on rights external to a CBA may proceed despite the fact that an arbitrator has previously decided the same factual issue when rendering a decision pursuant to a CBA.

APPENDIX

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF GENESEE

ROBERT DECOE,
Plaintiff,

No. 91
JUDGE:

vs

GENERAL MOTORS CORPORATION, DEBRA A. KLINE, PHYLLIS L. EVANS, KARAN S. MAURINA, MARJORIE E. CROCKER-HAMPTON, JERRI LYNN KRONENWETH, ANN M. GLYNN, ROXANNE M. DURHAM and CYNTHIA S. WHITE,
Defendants.

* * * * * * * * * * * * * * *

LAW OFFICE OF GLEN N. LENHOFF
BY: GLEN N. LENHOFF (P32610)
Attorney for Plaintiff
717 South Grand Traverse
Flint, MI 48502
(313) 235-5660

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There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this Complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other

civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this Complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disposed of after having been assigned to a Judge in this Court.

COMPLAINT AND JURY DEMAND

PARTIES AND JURISDICTION

Now Comes Plaintiff Robert DeCoe, by and through his attorneys, the Law Office of Glen N. Lenhoff, and hereby

complains of Defendants General Motors Corporation, Debra A. Kline, Phyllis L. Evans, Karen S. Maurina, Marjorie E. Crocker-Hampton, Jerri Lynn Kronenweth, Ann M. Glynn, Roxanne M. Durham and Cynthia S. White, as follows.

1. Plaintiff is a resident of the State of Michigan.
2. The individual Defendants in this case are residents of the State of Michigan.
3. Defendant General Motors Corporation is a corporation which transacts business in the State of Michigan.
4. The claims which Plaintiff assert in this case include: slander, civil conspiracy, tortious interference with economic relations. The claims in this case exceed Ten Thousand ($10,000.00) Dollars.
5. This Court has subject matter jurisdiction over this case based on the Court's general subject matter jurisdiction codified at MCLA Section 600.605.

GENERAL ALLEGATIONS

6. At all times pertinent to this lawsuit, Plaintiff has been employed as a committee man for Local 326 of the United Auto Workers.

7. The said committee man duties of Plaintiff involve important affairs of United Auto Workers Local 326 at the General Motors Cold Water Plant located in Genesee County, Michigan.

8. At all times pertinent to this case, Al Herold was Plant Manager at the said Coldwater Plant.

9. As Plant Manager, the said Mr. Herold had a very close relationship with Defendants Debra Kline and Jerri Lynn Kronenweth.

10. The said Defendants Kline and Kronenweth, at the behest of Al Herold, took a dislike to Plaintiff.

11. In addition, the individual Defendants in this case, Defendants Kline, Evans, Maurina, Crocker-Hampton, Kronenweth, Glynn, Durham and White were active in a faction in Local 326 that was in opposition to Plaintiff.

12. Because of the said Union political differences with Plaintiff, Defendants Kline, Evans, Maurina, Crocker-Hampton, Kronenweth, Glynn, Durham and White (hereinafter the individual Defendants) desired to wrest Plaintiff' committee man position away from Plaintiff.

13. The combination of Plant Manager Herold's encouragement and the said political reason for seeking Plaintiff's discharge caused the individual defendants in this case to file sham and spurious sex harassment complaints against Plaintiff and to state, on many occasions, to third

persons in the plant, that Plaintiff had committed vulgar and offensive sexual touchings and had directed vulgar and obscene language toward them.

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14. The said statements concerning Plaintiff were also made by the said Plant Manager Herold who well knew that the charges were not true

15. The said statements concerning Plaintiff were not true, and have lowered Plaintiff's esteem in the community.

16. Furthermore, the said statements and acts of the individual Defendants as well as Defendant General Motors Corporation, acting by and through Al Herold, have gravely impaired and damaged Plaintiff's ability to function as a Local 326 committee man.

17. The facts set out above have caused Plaintiff great anxiety.

COUNT I - SLANDER CLAIM AGAINST THE INDIVIDUAL DEFENDANTS IN THIS CASE

18. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 17 above.

19. Each of the individual Defendants in this case have stated to third persons, as well as to each other, that Plaintiff committed offensive sexual touchings and directed offensive sexual language at the said individual Defendants.

20. The individual Defendants have stated they were offended by the said statements and actions of Plaintiff.

21. In fact, Plaintiff did not direct offensive sexual actions or use offensive sexual language toward the individual Defendants.

22. Accordingly, the individual Defendants have made false statements concerning Plaintiff both to each other and to other third persons in the plant.

23. Accordingly, Plaintiff hereby asserts a slander claim against the individual Defendants.

COUNT II - SLANDER CLAIM AGAINST DEFENDANT GENERAL MOTORS CORPORATION

24. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 23 above.

25. Al Herold, as Plant Manager of General Motors Corporation, has stated to third persons including the individual Defendants that Plaintiff committed offensive sex based acts and used foul language of a sexual nature on the job as a Local 326 committee man.

26. The said accusation concerning Plaintiff is untrue.

27. The said statements by Defendant General Motors, acting and through Al Herold have caused Plaintiff great emotional distress.

28. Accordingly, Plaintiff hereby asserts a slander claim against Defendant General Motors Corporation.

COUNT III - TORTIOUS INTERFERENCE CLAIM AGAINST EACH AND EVERY DEFENDANT

29. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 28 above.

30. Defendants have deliberately interfered with Plaintiff's job as a Local 326 committee man.

31. Defendants have carried out the said interference maliciously and in bad faith.

32 Defendants have disrupted Plaintiff's employment and have caused Plaintiff not to be able to effectively function as a Local 326 committee man.

33. Accordingly, Plaintiff hereby asserts a tortious interference with economic relations against each and every Defendant in this case.

COUNT IV - CIVIL CONSPIRACY CLAIM AGAINST EACH AND EVERY DEFENDANT

34. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 33 above.

35. The individual Defendants in this case entered into a plan and agreement concerning Plaintiff.

36. Under the plan and agreement, the individual Defendants sought to nullify Plaintiff's effectiveness as a Local 326 committee man.

37. The individual Defendants planned to and agreed on doing so by way of circulating false statements about Plaintiff and asserting false accusations of sex harassment against Plaintiff.

38. Accordingly, Defendants entered into and carried out a plan to harm Plaintiff's professional life and employment by way of the unlawful means of slandering Plaintiff.

39. Accordingly, Plaintiff hereby asserts a civil conspiracy claim against each and every Defendant in this case.

COUNT VI - INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST THE INDIVIDUAL DEFENDANTS IN THIS CASE

40. Plaintiff hereby realleges and incorporates by reference paragraphs 1 through 39 above.

41. Defendants' acts toward Plaintiff, the acts of deliberately concocting spurious sex harassment charges and thereby besmirching Plaintiff's name and reputation, are shocking to the senses and outrageous.

42. Defendants have carried out the above acts in order to wrest Plaintiff's job from Plaintiff and cause Plaintiff severe emotional distress.

43. Accordingly, Plaintiff hereby asserts an intentional infliction of emotional distress claim against each and every Defendant in this case.

WHEREFORE, Plaintiff prays for judgment against Defendants in damages in such sum in excess of Ten Thousand ($10,000.00) Dollars as the jury deems just, together with costs and interest.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial in the captioned case as guaranteed by Rule 2.508(B) of the Michigan Court Rules.

Respectfully Submitted,
LAW OFFICE OF GLEN N. LENHOFF

Dated: ____ _____//s_____
By: Glen N. Lenhoff (P-32610)
Attorney for Plaintiff

717 South Grand Traverse
Flint, MI 48502

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DEFAMATION ACTION UNDER CALIFORNIA LAW

A defamation claim under California law requires: (1) a false and unprivileged statement, (2) published to a third person, (3) that tends to directly injure another. *Lundquist v. Reusser*, 31 Cal. Rptr.2d 776, 776, 7 Cal.4th 119 (Cal. 1994).

DEFAMATION ACTION UNDER IOWA LAW

A defamation claim under Iowa law requires: (1) a statement having a tendency to injure a person's reputation or good name (2) published to one or more third persons. *Taggart v. Drake Univ.*, 549 N.W.2d 796, 802 (Iowa 1996); *Kiesau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004)

DEFAMATION ACTION UNDER MARYLAND LAW

A defamation claim under Maryland law requires: "(1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm." *Offen v. Brenner*, 2007 MDCA 1-111407 (Nov. 14, 2007); *Smith v. Danielczyk*, 400 Md. 98, 115, 928 A.2d 795, 805 (2007).

DEFAMATION ACTION UNDER MICHIGAN LAW

A defamation claim under Michigan law requires: "(1) a false or defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm for defamation per se, or the existence of special harm caused by publication for defamation per quod." *Laney v. Blue Cross Blue Shield of Mich.*, No. 236977 (Mich. App. March 11, 2003) (citing *Kefgen v Davidson*, 241 Mich. App. 611, 617; 617 N.W.2d 351 (2000)).

DEFAMATION ACTION UNDER NEW YORK LAW

A defamation claim under New York law requires: (1) a false statement tending to expose the plaintiff to public contempt, ridicule, or disgrace, (2) published without privilege or authorization to a third party, (3) constituting fault as judged by, at a minimum, a negligence standard, and (4) either cause special harm or qualification as defamation per se. *Dillon v City of New York*, 261 A.D.2d 34, 37-38 (1999); citing Restatement of Torts, Second § 558.

DEFAMATION ACTION UNDER OHIO LAW

A defamation claim under Ohio law requires: (1) a false and defamatory statement; (2) in written (or oral) form; (3) that is published without privilege to a third person; (4) fault of the publisher for making the publication and; (5) in some instances, damages sustained therefrom. *Lawson v. AK Steel Corp.*, 121 Ohio App.3d 251, 256, 699 N.E.2d 951 (12th Dist. 1997); *Franks v. The Lima News*, 109 Ohio App.3d 408, 412, 672 N.E.2d 245 (3d Dist. 1996).